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DC Contractor Sdn Bhd v Universiti Pertahanan Nasional Malaysia

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-656 OF 2011
MARY LIM J
13 JUNE 2014

Contract — Agreement — Breach — Project to build and upgrade structures in university — Contractor applied for extension of time several time throughout project — Delay in project — Whether delay caused by university or contractor — Project not completed within extended time — University not satisfied with contractor's works and terminated contract with contractor two times — Which termination was valid — Whether first termination proper and in accordance with terms and conditions of contract — Whether second termination effective if first termination was invalid — Whether university suffered loss — Whether contractor liable for damages — Whether university entitled to claim and receive payment under guarantees

The plaintiff had successfully tendered for a project to build and upgrade several structures in the defendant's university for a total value of RM4,950,810 ('the project'). The specific structures were the bilik pengawal, pondok pengawal, setor senjata and the main entrance to the university. The parties then entered into contract and the project was expected to be completed by 25 January 2012. As agreed under the terms of the contract, the plaintiff provided the defendant with performance and advance payment guarantees. The plaintiff notified the defendant that the progress of works under the project was being delayed it sought a total of 149.5 days of extension of time ('EOT') under cl 43(b) and (f) of the contract for the reasons that there was delay in the plaintiff's receipt of re-design instructions from the engineer on the external drainage; delays due to discrepancies on various drawings; and unsuitable soil conditions. The plaintiff made another application for an EOT of now, 192 days. The plaintiff also provided further details of the discrepancies in drawings given together with supporting documents, in particular the relevant 'Refer for Instructions' ('RFI') for consideration of its application for an EOT. The plaintiff sought another extension of 36 days citing various reasons under cl 43 of the contract. However, the plaintiff did not complete by the extended date. It then sought a second extension of time and the reasons cited were the issuance of variation orders; issuance of latest construction drawings after the actual due date of completion; insufficient drawings and late information/instruction; and holidays. A total of three months was sought. This second application for an EOT was refused. Meanwhile, the defendant claimed that it was not satisfied with the plaintiff's works. After refusing the

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plaintiff's second application for extension of time, the defendant issued a notice of breach. Under cl 51 of the contract, the plaintiff had, 14 days from the date of receipt to complete various works which it had identified, failing which the contract will be terminated. The defendant claimed that there was no activity on site; and it had warned of slow progress by the plaintiff; and suspending work without reasonable excuse. The defendant's architect issued a certificate of non-completion and informed the plaintiff that LAD at the rate of RM915 per day would be imposed. The Ministry of Higher Education informed the defendant that the defendant's procedure of termination was not in compliance with the Ministry's guidelines. The defendant continued to terminate the contract pursuant to cl 51 of the contract ('the second termination'). Being dissatisfied, the plaintiff filed the present claim alleging that the first termination was invalid while the second termination was of no effect and claimed that the delays faced by the plaintiff in execution of the works under the project were in fact caused by the defendant's consultants; and not by the plaintiff. These consultants are said to have provided drawings to the plaintiff in stages resulting in delays to the works. It further claimed that as a result of the wrongful termination, it was blacklisted by Pusat Khidmat Kontraktor. The plaintiff sought compensation including damages on a quantum meruit basis for the work done. In defence and in its counterclaim, the defendant claimed that both terminations were valid. The defendant alleged that there were further delays that were caused entirely by the plaintiff's inability to complete the work. Amongst the reasons for the delay was the plaintiff's lack of manpower at the site. In relation to the first termination, the defendant claimed that it was proper and in accordance with the terms and conditions of the contract. These terms and conditions were said to supersede the guidelines issued by the Ministry of Higher Education. The issues that arose for the court's determination were whether the first termination of the contract by the defendant is valid; if the first termination is invalid, what is the quantum of damage to be paid to the plaintiff; whether the second termination was effective in the event that the first termination was invalid and the invitation to resume the contract was not accepted as the conditions of the plaintiff to resume work were not acceptable to the defendant; whether the defendant suffered loss as a result of the termination of the contract and whether the plaintiff was liable to pay damages to the defendant; and whether the defendant was entitled to claim and receive payment under the guarantees.

Held, allowing the plaintiff's claim and dismissing the defendant's counterclaim:

(1) The defendant's termination of the contract was invalid for several reasons. The proper place to start would be cl 51 upon which the defendant had issued the notice of termination and carried out related decisions and actions. The provisions of cl 51 ought to be given a strict interpretation since its application had decisive and far-reaching

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implications to the relationship and contractual obligations of the contracting parties. That impact included ending relationships, and freeing parties from their respective obligations; or conferring on them certain rights following a proper right of termination, if there was such a right (see paras 54–56).

(2) Even if the plaintiff had commenced work late, that was irrelevant since the defendant itself never found that to be a problem or a hindrance. The progress of the works was very much hampered by drawings and the lack of coordination between the defendant's various consultants. While the time for completion of the works was important, it was not to the extent of rendering it to be the essence of the contract thereby conferring upon the innocent party the right to treat the non-perfomance by such date or time as an act of repudiation. That innocent party had only a right to claim damages for the breach but does not have a right to terminate the contract (see paras 60–61).

(3) The court could not accept that by the mere giving of an extension of time, the issue of the letters of warning and the notice of breach, the parties had intended that time was of the essence. Time was not of the essence of this contract. These were evidence of the defendant not accepting the performance or alleged lack of performance by the plaintiff. The breach of these matters did not confer on the defendant a right to terminate the contract merely because of non-completion by the completion date. The defendant would only be entitled to damages for such a breach, if the grounds were proved true (see para 65).

(4) It was unreasonable for the defendant to have terminated the contract. The documentary evidence was replete with evidence of the defendant being displeased with its own consultants, whether in respect of their numerous delays in attending to the matters pending or giving the required information to the plaintiff. The defendant was frequently seen reminding the architect to coordinate actions and ensure timely actions between the consultants (see para 89).

(5) The court could not find any basis or justification for the defendant's allegation on the level of progress of the works under the contract. In the light of all this evidence including evidence from the defendant's own consultants, there was no justification for the defendant's termination of the contract. The plaintiff had indeed proceeded regularly and diligently with the works (see para 94).

(6) The parties, through the Ministry of Higher Education were unsuccessful in their negotiations on the terms of resumption of works. It was entirely within both parties' rights to set their respective terms for resumption of works when the defendant retracted the first letter of termination. That, however, has no bearing on the validity of the two

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letters of termination. The defendant could not argue that both letters of termination were valid and of effect. If the first letter of termination was valid and effective, then it took effect when it did. The second letter would be simply superfluous. To argue otherwise did not make any sense. The defendant could not cherry pick which letter of termination it wanted to rely on, depending on what the issue is (see paras 109–110).

(7) The court was not satisfied that the plaintiff had suffered any loss entirely by reason of being 'blacklisted'. A sum of RM300,000 had been submitted by the plaintiff as the appropriate sum. The court was not so inclined to make any award without any more definitive evidence of loss of reputation. There was no submission or any real pursuit on a claim for loss of profits. Accordingly, the court would not make any award for these claims which in any case, were not sustainable since no evidence have been led (see para 126).

[Bahasa Malaysia summary

Plaintif telah berjaya menenderkan untuk projek membina dan menaik taraf beberapa struktur di universiti defendan untuk nilai keseluruhan berjumlah RM4,950,810 ('projek tersebut'). Struktur-struktur spesifik adalah bilik pengawal, pondok pengawal, setor senjata dan pintu masuk utama ke universiti itu. Pihak-pihak kemudian memasuki kontrak dan projek itu dijangka siap pada 25 Januari 2012. Sebagaimana dipersetujui di bawah terma-terma kontrak, plaintif memberikan defendan jaminan pelaksanaan dan bayaran pendahuluan. Plaintif memberitahu defendan bahawa perkembangan kerja-kerja di bawah projek itu ditangguhkan ia memohon sejumlah 149.5 hari lanjutan masa ('LM') di bawah klausa 43(b) dan (f) kontrak kerana sebab-sebab bahawa terdapat kelewatan dalam penerimaan plaintif tentang arahan-arahan rekaan semula daripada jurutera berhubung perparitan luar; kelewatan-kelewatan akibat percanggahan pada pelbagai lukisan; dan keadaan tanah yang tidak sesuai. Plaintif telah membuat permohonan lain untuk LM ini, untuk 192 hari. Plaintif juga mengemukakan butiran lanjut berhubung percanggahan dalam lukisan-lukisan yang diberikan bersama dokumen-dokumen sokongan, terutamanya 'Refer for Instructions' ('RFI') yang relevan untuk pertimbangan permohonannya bagi suatu LM. Plaintif memohon lanjutan lain selama 36 hari dengan memberikan pelbagai sebab di bawah fasal 43 kontrak itu. Walau bagaimanapun, plaintif tidak siap menjelang tarikh yang dilanjutkan itu. Ia kemudian memohon lanjutan masa kedua dan sebab-sebab yang diberikan adalah keluaran pelbagai perintah-perintah; keluaran lukisan-lukisan pembinaan terkini selepas tarikh siap sebenar; lukisan-lukisan yang tidak mencukupi dan maklumat/arahan lewat; dan cuti. Sejumlah tiga bulan dipohon. Permohonan kedua ini untuk LM telah ditolak. Sementara itu, defendan telah mendakwa bahawa ia tidak berpuas hati dengan kerja-kerja plaintif. Selepas menolak permohonan kedua plaintif untuk lanjutan masa, defendan telah mengeluarkan notis pelanggaran.

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Di bawah klausa 51 kontrak, plaintiff mempunyai, 14 hari sebelum tarikh penerimaan untuk siap pelbagai kerja yang telah dikenal pasti olehnya, dan jika gagal kontrak itu akan ditamatkan. Defendan mendakwa bahawa tidak terdapat apa-apa aktiviti di tapak; dan ia telah memberi amaran berhubung prestasi lambat oleh plaintif; dan menangguh kerja tanpa alasan munasabah. Arkitek defendan telah mengeluarkan sijil belum siap dan memberitahu plaintif bahawa LAD pada kadar RM915 sehari akan dikenakan. Kementerian Pengajian Tinggi memberitahu defendan bahawa prosedur penamatan defendan tidak mematuhi garis panduan Kementerian. Defendan terus untuk menamatkan kontrak itu menurut klausa 51 kontrak ('penamatan kedua'). Berasa tidak puas hati, plaintif memfailkan tuntutan ini mengatakan bahawa penamatan pertama itu tidak sah manakala penamatan kedua tidak berkuat kuasa dan mendakwa bahawa kelewatan yang dihadapi oleh plaintif dalam pelaksanaan kerja-kerja di bawah projek tersebut sebenarnya disebabkan oleh perunding-perunding defendan; dan bukan oleh plaintif. Perunding-perunding tersebut dikatakan telah memberikan lukisan-lukisan kepada plaintif mengikut peringkat-peringkat mengakibatkan kelewatan dalam kerja-kerja itu. Selanjutnya adalah didakwa bahawa akibat daripada penamatan salah itu, ia telah disenaraihitamkan oleh Pusat Khidmat Kontraktor. Plaintif telah memohon pampasan termasuk ganti rugi berasaskan kuantum meruit untuk kerja yang dilakukan. Dalam pembelaan dan tuntutan balasnya, defendan mendakwa bahawa kedua-dua penamatan adalah sah. Defendan mengatakan bahawa terdapat kelewatan selanjutnya yang disebabkan keseluruhannya oleh ketidakmampuan plaintif untuk menyiapkan kerja itu. Antara sebab-sebab kelewatan adalah tenaga kerja plaintif yang kurang di tapak itu. Berhubung penamatan pertama, defendan mendakwa bahawa ia adalah wajar dan menurut terma-terma dan syarat-syarat kontrak itu. Terma-terma dan syarat-syarat tersebut dikatakan menggantikan garis panduan yang dikeluarkan oleh Kementerian Pengajian Tinggi. Isu-isu yang timbul untuk penentuan mahkamah adalah sama ada penamatan pertama kontrak oleh defendan adalah sah; jika penamatan pertama adalah tidak sah, apakah kuantum ganti rugi untuk dibayar kepada plaintif; sama ada penamatan kedua adalah berkuat kuasa sekiranya penamatan pertama tidak sah dan pelawaan untuk meneruskan kontrak tidak diterima kerana syarat-syarat plaintif untuk meneruskan kerja tidak boleh diterima oleh defendan; sama ada defendan mengalami kerugian akibat penamatan kontrak dan sama ada plaintif bertanggungjawab untuk membayar ganti rugi kepada defendan; dan sama ada defendan berhak untuk menuntut dan menerima bayaran di bawah jaminan.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan:

(1) Penamatan kontrak defendan adalah tidak sah kerana beberapa sebab. Adalah wajar untuk merujuk kepada klausa 51 di mana defendan telah

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mengeluarkan notis penamatan dan melaksanakan keputusan dan tindakan berkaitan. Peruntukan klausa 51 patut diberikan tafsiran ketat oleh kerana permohonannya mempunyai implikasi yang penting dan meluas kepada hubungan dan tanggungjawab kontraktual pihak-pihak dalam kontrak. Kesan itu termasuk menamatkan hubungan, dan melepaskan pihak-pihak daripada tanggungjawab masing-masing; atau memberikan mereka hak-hak tertentu berikutan hak sebenar penamatan, jika terdapat hak sedemikian (lihat perenggan 54–56).

(2) Jikapun plaintif memulakan kerja lewat, ia tidak relevan kerana defendan sendiri tidak mendapati ia satu masalah atau halangan. Pelaksanaan kerja-kerja amat terkesan oleh lukisan-lukisan dan kurang penyelarasan antara pelbagai perunding-perunding defendan. Walaupun masa untuk siap kerja adalah penting, ia bukan sehingga menyebabkannya menjadi intipati kontrak yang memberikan pihak yang tidak bersalah hak untuk menganggap ketidaklaksanaan pada tarikh atau masa tersebut sebagai suatu tindakan penolakan. Pihak yang tidak bersalah hanya mempunyai hak untuk menuntut ganti rugi untuk pelanggaran tetapi tidak mempunyai hak untuk penamatan kontrak (lihat perenggan 60–61).

(3) Mahkamah tidak boleh menerima bahawa dengan hanya memberikan lanjutan masa, isu surat-surat amaran dan notis pelanggaran, pihak-pihak tersebut telah berniat bahawa masa adalah penting. Masa tidak penting dalam kontrak ini. Berikut adalah keterangan defendan yang tidak menerima pelaksanaan atau kurangnya pelaksanaan yang dikatakan oleh plaintif itu. Pelanggaran perkara-perkara tersebut tidak diberikan ke atas defendan suatu hak untuk menamatkan kontrak itu hanya kerana ketidakpatuhan menjelang tarikh siap. Defendan hanya berhak terhadap ganti rugi untuk pelanggaran, jika alasan dibuktikan benar (lihat perenggan 65).

(4) Adalah tidak munasabah untuk defendan menamatkan kontrak. Keterangan dokumentar lengkap dengan keterangan defendan berasa tidak puas hati dengan perunding-perundingnya sendiri, sama ada berkaitan beberapa kelewatan mereka dalam mengendalikan perkara-perkara yang belum selesai atau memberikan maklumat yang dikehendaki kepada plaintif. Defendan seringkali dilihat mengingatkan arkitek untuk menyelaraskan tindakan dan memastikan tindakan tepat pada masanya antara perunding-perunding (lihat perenggan 89).

(5) Mahkamah tidak mendapati apa-apa asas atau justifikasi untuk dakwaan defendan berhubung tahap pelaksanaan kerja-kerja di bawah kontrak itu. Berdasarkan kesemua keterangan ini termasuk keterangan daripada perunding-perunding defendan sendiri, tiada wajar untuk menamatkan kontrak defendan. Plaintif sebenarnya telah meneruskan kerja dengan tetap dan bersungguh-sungguh (lihat perenggan 94).

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(6) Pihak-pihak, melalui Kementerian Pengajian Tinggi tidak Berjaya dalam rundingan mereka berhubung terma-terma sambungan kerja. Adalah hak-hak menyeluruh kedua-dua pihak untuk menetapkan terma-terma sambungan kerja masing-masing apabila defendan menarik balik surat penamatan pertama. Itu, bagaimanapun, tiada kesan atas keesahan dua surat penamatan. Defendan tidak boleh berhujah bahawa kedua-dua surat penamatan itu adalah sah dan berkuat kuasa. Jika surat penamatan pertama adalah sah dan berkuat kuasa, maka ia berkuat kuasa pada masa tersebut. Surat kedua dengan itu tidak diperlukan. Untuk berhujah sebaliknya tidak bermakna. Defendan tidak memilih surat penamatan yang ingin digunakan, bergantung kepada isu yang dipersoalkan (lihat perenggan 109–110).

(7) Mahkamah tidak berpuas hati bahawa plaintif telah mengalami apa-apa kerugian kerana telah disenaraihitamkan. Jumlah RM300,000 telah dikemukakan oleh plaintif sebagai jumlah yang sesuai. Mahkamah tidak cenderung untuk membuat award tanpa apa-apa keterangan yang pasti untuk reputasi yang terjejas. Tiada hujah atau apa-apa usaha sebenar berhubung tuntutan untuk kerugian keuntungan. Sewajarnya, mahkamah tidak boleh membuat apa-apa award untuk tuntutan-tuntutan tersebut dalam apa-apa kes, tidak boleh dikekalkan oleh kerana tiada keterangan telah dikemukakan (lihat perenggan 126).]

Notes

For a case on breach, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) para 2962.

Cases referred to

Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Damansara Realty Sdn Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464; [2011] 9 CLJ 257, FC (refd)

David Hey v New Kok Ann Realty Sdn Bhd [1985] 1 MLJ 167, FC (refd)

Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd [1998] 6 MLJ 80, HC (folld)

Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, HL (refd)

Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd [2007] 4 MLJ 113, CA (refd)

Pernas Construction Sdn Bhd v Syarikat Rasabina Sdn Bhd [2004] 3 AMR 635, CA (refd)

Thong Foo Ching & Ors v Shigenori Ono [1998] 4 MLJ 585; [1998] 4 CLJ 674, CA (refd)

West Faulkner Associates v London Borough of Newham (1994) 422 ConLR 144, CA (refd)

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Zainal Abidin Mustapha (Zainal & Mariana) for the plaintiff.
Muhammad Adam Abdullah (Fareez Zahir with him) (Adam Abdullah & Mani) for the defendant.

Mary Lim J:

BACKGROUND FACTS

[1] The plaintiff successfully tendered for a project to build and upgrade several structures in the defendant's Universiti Pertahanan Nasional Malaysia for a total value of RM4,950,810 ('the project'). Specifically, the structures were the *bilik pengawal, pondok pengawal, stor senjata* as well as the *jalan masuk utama* to the university. For this, the defendant issued the plaintiff a letter of award dated 30 June 2009. Subsequently, a formal contract dated 11 January 2010 was entered into between the parties ('the contract') — see p 8 of bundle A.

[2] The plaintiff was granted site possession on 14 July 2009 and the project was expected to be completed by 25 January 2010. As agreed under the terms of the contract, the plaintiff provided the defendant with performance and advance payment guarantees. For the purposes of the project, the defendant appointed several consultants; namely Damansara Architect as the architect ('the architect'); Mohd Asbi & Assoc as the civil and structural engineering consultants ('MAA'); Juruukur Bahan HRM as the quantity surveyor ('QS'); and Emzex Consulting Engineers as the electrical and mechanical engineering consultants ('M&E Consultants').

[3] By letter dated 22 October 2009, the plaintiff notified the defendant that the progress of works under the project was being delayed for various reasons and it sought a total of 149.5 days of extension of time under cl 43(b) and (f) of the contract ('EOT No 1') — see pp 1 and 2 of bundle B. Amongst the reasons given were: delay in the plaintiff's receipt of redesign instructions from the engineer on the external drainage (the plaintiff had found existing underground cable pipe and telephone line services when it excavated for drainage pipes); delays due to discrepancies on various drawings; and unsuitable soil conditions.

[4] During the course of the project, variation orders were issued by the defendant, the last of which was on 25 January 2010 while the first four related to a test on soil conditions known as the Mackintosh Probe Test; piling works; proposed new RC drain; and 4 Nos HDPE Cable pipe. As a result of these VOs, the plaintiff made another application on 17 December 2009 for an EOT of now, 192 days — see pp 3 and 4 of bundle B. In this application, the plaintiff further cited cl 43(e) wherein the plaintiff was required to reschedule the work

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programme; and, carry out additional work. The plaintiff also provided further details of the discrepancies in drawings given together with supporting documents, in particular the relevant RFIs or 'Refer for Instructions' for consideration of its application for an EOT. On 25 January 2010, the plaintiff sought another extension of 36 days citing various reasons under cl 43 of the contract.

[5] The plaintiff was granted an extension of time wherein the completion date was extended to 30 June 2010 — see p 96 of bundle B. This extension was granted on the recommendation of the 'Jawatankuasa Arahan Perubahan Kerja Kali Ke-4/2010' which had sat on 17 May 2010 to consider all of the plaintiff's applications to date.

[6] However, the plaintiff did not complete by the extended date. It then sought a second extension of time on 22 June 2010 — see p 122 of bundle B. Amongst the reasons cited were the issuance of variation orders; issuance of latest construction drawings after the actual due date of completion; insufficient drawings and late information/instruction; holidays. A total of three months was sought. This second application for an EOT was refused.

[7] Meanwhile, the defendant claimed that it was not satisfied with the plaintiff's works. After refusing the plaintiff's second application for extension of time, the defendant issued a notice of breach dated 23 June 2010 under cl 51 of the contract giving the plaintiff 14 days from the date of receipt to complete various works which it had identified (*dinding penahan dan kemasan untuk* 'feature wall'; *kerja-kerja konkrit di stor senjata; kerja-kerja pemasangan* 'cladding' *dan kemasan luar di balai pengawal*; *pemasangan tangga di balai pengawal*; 'flight light'); failing which the contract will be terminated. The defendant also, inter alia, cited repeated failures on the plaintiff to comply with three earlier letters of warning dated 4 February 2010; 12 March 2010 and 26 May 2010. In those letters, the defendant had claimed that there was no activity on site; and it had warned of slow progress by the plaintiff; and suspending work without reasonable excuse — see p 109 of bundle B. In its notice dated 23 June 2010, the defendant once again cited failure of the plaintiff to provide sufficient manpower despite its earlier warning letters.

[8] The plaintiff received this letter on 29 June 2010 and replied the very next day to each of the matters raise by the defendant along with provided documents in support of its explanations — see p 125 of bundle B. In summary, the plaintiff claimed that work on the matters raise were delayed for the following reasons:

(a) the defendant's own confirmation on some of the matters was pending;

(b) late instructions from the defendant's consultants;

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(c) the plaintiff could not commence variation work until specific instructions were issued; A

(d) the plaintiff was still waiting for latest drawings.

[9] The defendant disagreed. On 1 July 2010, the defendant's architect issued a certificate of non-completion and informed the plaintiff that LAD at the rate of RM915 per day would be imposed (see p 70 of bundle B1). By letter dated 13 July 2010 (see p 119 of bundle B), the defendant proceed to terminate the contract by letter ('the first termination'). B C

[10] Subsequently, the Ministry of Higher Education informed the defendant that the defendant's procedure of termination was not in compliance with the Ministry's guidelines — see letter dated 4 August 2010 at p 163 of bundle B. On 16 August 2010, the defendant, inter alia, told the plaintiff that in deference to the Ministry of Higher Education, it was inviting the plaintiff to complete the project subject to certain conditions — see p 175 of bundle B. Those conditions were: D

(a) that the work insurances be renewed in accordance with the extensions granted; E

(b) that the guarantees be renewed accordingly;

(c) that the plaintiff procure permission to enter the work site from Markas Kem Sg Besi; and F

(d) that the plaintiff submit a work schedule to the defendant for its supervision of the works.

[11] On 24 August 2010, the plaintiff responded with its own set of terms. Amongst its terms (p 177 of bundle B) were: G

(a) the plaintiff was prepared to attend to the renewals of the guarantees and insurances after extensions of time was granted;

(b) while it had furnished a works programme for the next four months, the plaintiff requested that detailed and final drawings be provided by the defendant's consultants and that such drawings should not be further amended at time of implementation; H

(c) any additional works must be approved and confirmed prior to execution and that the plaintiff was entitled to receive 70% payment of completed works based on quotations given; I

(d) confirmation of completed works based on re-measurement;

(e) payment of compensation to the plaintiff.

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[12] The defendant disagreed and on 25 November 2010, it terminated the contract pursuant to cl 51 of the contract ('the second termination').

[13] Being dissatisfied, the plaintiff filed the present claim alleging that the first termination is invalid while the second termination was of no effect. In substance, the plaintiff claimed that the delays faced by the plaintiff in execution of the works under the project were in fact caused by the defendant's consultants; and not by the plaintiff. These consultants are said to have provided drawings to the plaintiff in stages resulting in delays to the works. Insofar as the notice of breach is concerned, the plaintiff claimed compliance.

[14] It further claimed that as a result of the wrongful termination, it was 'blacklisted' by 'Pusat Khidmat Kontraktor'. The plaintiff sought compensation including damages on a quantum meruit basis for the work done. It also sought an injunction preventing the defendant from calling on the guarantees mentioned earlier.

[15] In defence and in its counterclaim, the defendant claimed that both terminations were valid. The defendant claimed that the EOT granted to the plaintiff had taken into account the delays caused by the defendant's consultants in producing the drawings and the VOs issued. The VOs were issued based on what is known as the 'Mackintosh Probe Test'. The purpose of this MP test was to ascertain the soil conditions of the project site. The tests revealed that the soil conditions within the vicinity of the *stor senjata* did not achieve the required standard. Subsequently, several other VOs were issued. The defendant claimed that the plaintiff did not object to this extension at the material time.

[16] The defendant alleged that there were further delays that were caused entirely by the plaintiff's inability to complete the work. Amongst the reasons for the delay was the plaintiff's lack of manpower at the site. in relation to the first termination, the defendant claimed that it was proper and in accordance with the terms and conditions of the contract. These terms and conditions are said to supersede the guidelines issued by the Ministry of Higher Education. The defendant claimed that its letter inviting the plaintiff to complete the project 'was to ensure that the Defendant was not seen as defying the advice of the Ministry of Higher Education'. The defendant pleaded that the plaintiff was estopped and/or barred in equity from seeking any relief from court as the plaintiff had not objected to the conditions stipulated in the defendant's letter of 16 August 2010 inviting the plaintiff to complete the project. All that the plaintiff raised was the matter of quantum of damages to be paid to the plaintiff.

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[17] In its counterclaim, the defendant claimed LAD at the rate of RM915.90 per day for the late completion of the project as well as damages for completion of the works by another contractor that it had appointed. The defendant claimed to be entitled to call on the guarantees.

ISSUES TO BE TRIED

[18] Five issues were identified, namely:

(a) whether the first termination of the contract by the defendant is valid;

(b) if the first termination is invalid, what is the quantum of damage to be paid to the plaintiff;

(c) whether the second termination is effective in the event that the first termination is invalid and the invitation to resume the contract was not accepted as the conditions of the plaintiff to resume work were not acceptable to the defendant;

(d) whether the defendant suffered loss as a result of the termination of the contract and whether the plaintiff is liable to pay damages to the defendant; and

(e) whether the defendant is entitled to claim and receive payment under the guarantees.

TRIAL

[19] The plaintiff called two witnesses, Abdul Azih bin Abdul Ghani ('PW1') and Wan Ahmad Nasri Wan Ismail ('PW2'). The defendant called five witnesses; namely Shahida bt Jaafar ('DW1'); Ahmad Tamin bin Ahmad Maher ('DW2'); Ir Narain Singh ('DW3'); Sr Rosdi bin Hj Mohamed ('DW4'); and Muhamad Izzudin bin Ishak ('DW5').

[20] PW1 was the *pengurus projek*. He supervised the works for the plaintiff and was familiar with the matters raise. He testified on the plaintiff's applications for extensions of time (EOT); progress of works; the defendant's two terminations; and the plaintiff's losses. According to him, the plaintiff's scope of works and progress of works were affected when the defendant amended the original drawings and when the defendant's consultants gave the plaintiff the relevant drawings either late or 'secara berperingkat-peringkat'. This necessitated in the plaintiff applying for an EOT which it did on 22 September 2009.

[21] However, with the issuance of several VOs, the plaintiff decided to make a fresh application for an EOT on 17 December 2009. A total of 192 days was sought. The main reasons for the application were the problems related to

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the drawings, the variation orders; and the delay in confirmation of the variation orders. PW1 further testified that the reasons relied on in the application were repeatedly discussed at site meetings attended by the parties, including the defendant's several consultants. The minutes of site meetings Nos 7, 8 and 9 were shown in support (see pp 293–301 of bundle B).

[22] It is PW1's evidence that the plaintiff's application for EOT was not discussed at these meetings. Instead, the defendant issued the plaintiff a certificate of non-completion or *sijil perakuan tidak siap* on 25 February 2010 on the basis that the plaintiff had not completed the works by 25 January 2010. The defendant imposed LAD of RM915 per day on the plaintiff — see p 13 of bundle B.

[23] The plaintiff's application for EOT was finally approved on 31 May 2010. That EOT was communicated to the plaintiff vide the defendant's consultant, HRM's letter to the plaintiff dated 17 June 2010 (see p 96 at bundle B). The plaintiff was granted an extension from 25 January 2010 to 30 June 2010 to complete the said project on the recommendation of the Jawatankuasa Arahan Perubahan Kerja. The minutes of the committee which had sat on 17 May 2010 were released to the plaintiff.

[24] In those minutes, it is recorded that the application had only considered the VOs till date; and that the EOT was recommended on the basis of delay on the part of the defendant's consultants in issuing the amended drawings. According to the minutes, these drawings were issued by the consultants on 22 April 2010 (see pp 99–100 of bundle B).

[25] It is PW1's evidence that the drawings referred to in the letter granting the EOT were only received on 3 May 2010. It is also his evidence that the drawings continued to be issued to the plaintiff 'secara berperingkat'; even as late as 5 May 2010, 10 May 2010, 20 May 2010, 24 May 2010, 31 May 2010; and into the month of June; that the drawings given were either incomplete or required drawings of other consultants; or involved works which the plaintiff claimed were outside its scope of works; such that the plaintiff was simply unable to continue with the works. The plaintiff decided to put all this down in writing vide its letter dated 2 June 2010. In that letter, the plaintiff informed the defendant that the delays faced by the plaintiff were caused by the defendant's consultants. PW1 claimed that it was a result of this official complaint to the defendant that the plaintiff's relationship with the defendant's consultants soured or 'menjadi bertambah tidak baik' with the parties each pointing fingers at the other, assigning blame to the other.

[26] At the same time, the plaintiff decided to make a second application for another EOT in view of further VOs issued; and because of the amended or

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revised drawings that were received after April 2010. This second application was made vide letter dated 22 June 2010 (see p 122 of bundle B). PW1 informed the court that this application was rejected by the defendant who proceeded to issue a notice of breach on the plaintiff on 23 June 2010 (see p 109 of bundle B). On 1 July 2010, another certificate of non-completion was issued (p 112 of bundle B).

[27] It is PW1's testimony that there was no breach on the plaintiff's part; that the five principal allegations were either unfounded; or that the matters complained of had already been attended to. PW1 told the court that the substance of the defendant's complaints was that the plaintiff had insufficient manpower. However, in the joint inspection of 8 July 2010 conducted in the presence of the defendant's consultants, the plaintiff was informed that the notice had been complied with. PW1 referred to HRM's letter dated 8 July 2010 to the defendant in support — see p 118 of bundle B where HRM stated:

> Kami merujuk kepada surat Puan ... bertarikh 23 Jun 2010 dan lawatan tapak yang dijalankan oleh pihak kami bersama pihak kontraktor pada 8 Julai 2010.
>
> Kami mendapati pihak kontraktor telah menunjukkan kesungguhan untuk mematuhi notis kemungkiran kontraktor iaitu meneruskan kerja dengan mengikut aturan dan tekunnya seperti menambah bilangan pekerja, menyiapkan bumbung di Balai Pengawal, memasang kerangka besi untuk tangga dan menyiapkan pemasangan 'cladding'.
>
> Memandangkan pihak kontraktor telah berusaha untuk mematuhi notis kemungkiran kontraktor maka pihak kami berpendapat adalah tidak wajar pengambilan kerja kontraktor ditamatkan.
>
> Sekiranya didapati pihak kontraktor mengulangi kemungkiran yang sama pada bila bila masa akan datang, maka penamatan pengambilan kerja kontraktor dapat diteruskan.

[28] PW1 testified that despite this letter from the defendant's own consultants, the contract was terminated vide the defendant's letter dated 13 July 2010 (p 119 of bundle B). The plaintiff was asked to vacate the site which it did on 16 July 2010 leaving behind those materials already delivered to the site for the works.

[29] PW1 testified that the plaintiff had protested on the termination. Following its complaint, Kementerian Pengajian Tinggi had directed (*mengarahkan*) the defendant to retract its termination letter. This was accordingly done by the defendant, but on terms. The plaintiff had countered with its own terms which involved the defendant considering the plaintiff's application for the second EOT, and payment of RM495,810 as costs of mobilisation. The defendant refused. PW1 testified that the defendant was only prepared to pay a sum of RM200,000. With this state of affairs, the plaintiff refused to attend a meeting referred to as 'mesyuarat projek sakit'. The

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defendant then issued a second notice of termination on 25 November 2010 (see p 181 of bundle B).

[30] PW1 told the court that the plaintiff was 'blacklisted' by Pusat Khidmat Kontraktor Kementerian Kerja Raya ('PKK') as a result of this termination. In its letter dated 14 December 2010, PKK informed the plaintiff that it was further not allowed to tender for any government projects (see p 184 of bundle B).

[31] In relation to the plaintiff's progress of works, PW1 informed the court that despite the defendant's failure to decide on the first EOT application, the plaintiff's progress of work was commendable — see minutes of site meetings Nos 10, 11 and 12. For example, in the minutes of site meeting No 12 dated 11 January 2010 at pp 282–285 of bundle B, the progress of the plaintiff's works was recorded as high as 80.56%; and this was measured against the original completion date of 25 January 2010 as the application for EOT had still not been considered at that material time.

[32] It was PW1 's evidence that the plaintiff continued and was allowed by the defendant to continue with the works even after that original completion date had lapsed. As reflected in the minutes of ensuing site meetings, the matters raise and discussed in previous site meetings remained either unresolved or pending; those matters concerned drawings which were repeatedly amended or revised; or which were yet to be furnished by the consultants; as well as VOs that had yet to be approved by both the defendant and its consultants. See for example minutes of site meeting No 13 at pp 279–281 of bundle B. It was the plaintiff's contentions that the delays that it faced were all occasioned by the defendant's consultants. Even the defendant themselves had repeatedly cautioned their consultants on the same as seen from the defendant's letters to the consultants dated 29 January 2010, 8 April 2010 and 15 April 2010; as well as the minutes of the numerous site meetings.

[33] PW1 next testified on the plaintiff's losses which were prepared by its consultant, Mokhnar & Assoc dated 8 March 2011 (see pp 189–243 of bundle B). I shall deal with this part of the evidence together with PW2's evidence. PW2 was the person who prepared the plaintiff's final claim which he referred to as the plaintiff's 'final evaluation' found at pp 189–243 of bundle B. He was engaged by the plaintiff to evaluate and prepare the plaintiff's final claim. In the claim prepared, he identified his evaluation in his capacity as 'Independent QS'. He told the court that he was appointed two weeks before the date of his report on 8 March 2011.

[34] PW2 testified that his calculations were based on the contract documents including the correspondence between the parties, claims and

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interim payment certificates as well as the rates found in the bill of quantities ('BQ'). He had also visited the site in order to value the works done.

[35] According to PW2, the total amount due from the defendant is RM1,794,531.51. The details of his analysis can be found from pp 191–243. What PW2 had done was to consider each item of claim according to the contract sum, amount valued by the defendant's consultant QS before offering his evaluation of the same as 'Independent QS'. PW2 informed the court that the final amount of RM3,476,482.59 shown at p 191 differed from that shown at p 190 which reads as RM3,724,023.09 was because the earlier did not take into account the performance bond of RM247,540.50.

[36] As for the defendant's witnesses, this was their testimonies.

[37] DW1 was the defendant's director at Jabatan Pembangunan dan Penyelenggaraan. She was in fact the superintending officer ('SO') or *pegawai penguasa* of this project. She testified that the plaintiff was informed vide letter dated 30 June 2009 that the superintending officer's representative was Damansara Architect Diserambi ('Damansara Architect'). Damansara Architect would supervise and manage the project for the defendant.

[38] It was DW1's testimony that the overall progress of the plaintiff's work was not satisfactory. This was reflected in the defendant's report known as 'Laporan Project Sakit' found at p 303 of bundle B1. While she agreed that the defendant had issued several VOs in this project and that an EOT was granted, it was also her testimony that aside for the soil conditions of the site where the armoury store was located which led to the issuance of a VO, the other VOs were issued so that the plaintiff could carry out the works more expeditiously (*supaya pihak plaintif dapat menyiapkan kerja-kerja pembinaan dengan lebih cepat*). She cited the example of the removal of a water feature which ought to have built at the reclining wall of the armoury store being removed from the works so that the plaintiff could complete the works in time.

[39] DW1 further testified that the plaintiff did not show commitment in seeing to the completion of the contract within the terms of the contract; that the plaintiff frequently and deliberately gave or found excuses for not carrying out the works when in fact instructions had already been issued for the same.

[40] Insofar as the notice of termination is concerned, DW1 explained why the first notice of termination was retracted. According to her, the Ministry of Higher Education had advised that the termination was not in accordance with Treasury guidelines. Under *Pekeliling Perbendaharaan Bilangan 8 Tahun 2009*, the project should be referred to a committee known as Jawatankuasa Projek Sakit 'bagi memastikan bahawa penamatan kontraktor tersebut selaras dengan

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A syarat-syarat kontrak'. It was out of respect for the Ministry that the defendant retracted or withdrew its notice of termination. However, when the plaintiff refused to resume works, and instead demanded compensation which was unsupported by an evidence, the defendant terminated the contract on 25 November 2010. In its counterclaim, the defendant sought damages in the B form of LAD as provided under the terms of the contract.

[41] DW2 is a director with Mohd Asbi & Assoc (MAA), the civil and structural engineering consultants. He informed the court that MAA was 'entrusted to carry out all design works for the civil and structural components C of the said project, namely the upgrading of the main entrance road, guard house, sentry post and weapons store' (the weapons store being the armoury store). MAA worked with Damansara Architect, the M&E Engineer and HRM.

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[42] According to DW2, the plaintiff 'lacked experience in handling their various responsibilities. This was apparent especially in the poor overall planning and execution of the said project.' He further told the court that the plaintiff 'was forced to subcontract as they lacked the requisite expertise. This E led to the Plaintiff losing control over the project' with the subcontractors not following the plaintiff's instructions and with the consultants having to deal with the subcontractors directly instead of through the plaintiff. He added that the plaintiff's works were 'further hampered by the Plaintiff's inadequate capital which disrupted the cash flow concerning payments to be made by the F Plaintiff to the subcontractors'. DW2 also told the court that the first EOT granted on the basis of delay in completion of drawings by the consultants was also due to the plaintiff's failure 'to provide the needed reports to the project consultants'; as well as provide supporting documents for their EOT application.

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[43] DW3 was the officer in M&E Consultants given charge of this contract. He was responsible for designing and monitoring the M&E works in the project. He attended the relevant meetings. He testified that the plaintiff had insufficient manpower and that delayed the plaintiff's progress of the works. H Like DW1 and DW2, DW3 testified that the first EOT was granted after taking into account the delayed issuance of the amended or revised drawings by the consultants. However, he added that the plaintiff did not commence work as scheduled.

I **[44]** DW4 was from HRM. He was the relevant officer having charge. DW4 similarly told the court that the plaintiff frequently had manpower problems. This caused a delay in the completion of the works. He was also called to explain HRM's letter dated 8 July 2010. According to DW4, this letter was issued with the intention of informing the defendant and Damansara Architect

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that the paintiff had shown commitment in its work. It was his evidence that it was not the purview of HRM to do that but Damansara Architect's. According to DW4:

> Saya selaku Juruukur Bahan hanya mengemukakan pendapat. Walaubagaimanapun, keputusan untuk mengeluarkan notis penamatan tersebut adalah hak mutlak pihak Defendan.

[45] DW4 confirmed PW1's testimony of the defendant being only prepared to pay a sum of RM200,000. According to DW4, this was because his calculations showed that the plaintiff was only entitled to this amount, and not that which the plaintiff had claimed.

WHETHER THE FIRST TERMINATION OF THE CONTRACT BY THE DEFENDANT IS VALID

[46] I shall summarise the submissions of both parties on this issue.

[47] It is the plaintiff's submission that the defendant's first termination is invalid. According to learned counsel, the letter of termination refers to the non-compliance of the plaintiff of the notice dated 24 June 2010 which gave the plaintiff 14 days to rectify the matters or breaches complained of. It is the plaintiff's case that the notice had indeed been complied with and there is ample evidence from PW1 and DW3's testimonies to support the plaintiff's claim. It was also learned counsel's contention that since the plaintiff had applied for a second EOT at that material time, the defendant should not have terminated the contract. Instead, it should have granted the extension. If that extension had been granted, then the issue of non-compliance and non-completion of the contract would simply not arise.

[48] The defendant submitted otherwise. It is the defendant's case that because time is of the essence in this contract, the defendant has a right to terminate the contract the moment the plaintiff failed to complete the project within the time agreed under the terms of the contract. It is further the defendant's case that the plaintiff had failed to proceed with the works regularly and diligently (*meneruskan kerja dengan mengikut aturan dan tekunnya*). Learned counsel for the defendant submitted that the plaintiff's progress of works was 'painfully slow and unacceptable'; and this was a 'common occurrence' as evident from the minutes of site meetings. It was added that since the defendant had granted the plaintiff an extension of time on account of the defendant's consultants' delay in furnishing the requisite drawings; the plaintiff's failure to complete by the extended time was an inordinate delay. That delay was further attributable to a lack of manpower at the site. All this is said to amount to a breach of the terms and conditions of the contract for which the defendant was entitled to terminate under cl 51 of the contract.

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[49] The defendant added that three written warnings had already been issued for this breach. Despite such warnings, the plaintiff had not shown any compliance or improvement in its progress of works. According to the defendant, the amount of work done at the site stood at only 61% at the time of the termination. This led to the issuance of a certificate of non-completion on 1 July 2010 which was relied on as evidence.

[50] The defendant also referred to the reasons for the first EOT in further support of its contention that the plaintiff was guilty of inordinate delay in the execution of the works. For example, one of the reasons why that first EOT was granted was because of a soil test known as the Mackintosh Probe Test. A Mackintosh Probe Test was required to determine the soil conditions at the site. The defendant claimed that the plaintiff delayed in carrying out this test leading to a consequential delay in the completion of the works. Next, the defendant claimed that the plaintiff failed to provide building components on time; failed to provide a proper work schedule; and that the delay in the issuance of VOs were in part, due to the plaintiff's own fault in preparing the VO claims late. It was also the defendant's submission that some of the VOs were actually issued for the purpose of accelerating the plaintiff's works. The water feature which was initially planned for the retaining wall at the armoury store was cancelled as the plaintiff was unable to complete this work on time.

[51] It was submitted that all these matters were not disputed by the plaintiff. In relation to the matter of drawings being amended or revised throughout the contract period, the defendant claimed that the issue of drawings being given late to the plaintiff (that is, on 22 April 2010) had already been taken into account when granting the first EOT. Yet, the plaintiff continued to use the 'same tried and tired excuses' in order to 'cloud the issues at hand'.

[52] Further, the defendant refuted DW4's authority to provide any confirmation as to the plaintiff's progress of the works. It was the defendant's submission that HRM and thereby DW4 had no mandate in this regard. The 'prerogative belongs rightfully to the 'Pegawai Penguasa' which in this case would be Damansara Architect'. The defendant submitted that HRM's letter dated 8 July 2010 stating that the plaintiff was making progress was 'At best, ... an expression of an opinion on the Plaintiff's progress'. The defendant claims that it is not bound to this opinion; and it alleged that the plaintiff had 'full knowledge' of the same.

[53] In the matter of the retraction of the first letter of termination, the defendant submitted that this was done out of deference to the opinion of the Ministry; and that any non-compliance of the guidelines had no legal effect. In any case, it was submitted that the letter of retraction never said that the earlier

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termination was 'unlawful'. The retraction was following the advice of the Ministry in relation to the proper procedure of termination. Learned counsel for the defendant added that government circulars and internal regulations and rules including guidelines pertaining to universities, of which the defendant was one, really had no legal effect. These guidelines do not take precedence over contractual obligations of the parties. Since there was evidence of breaches on the part of the plaintiff especially of the plaintiff's failure to proceed with the works regularly and diligently, the defendant argued that it was entirely within its rights to terminate the contract.

[54] Upon careful consideration of the evidence and submissions of both parties, the court is inclined to find this issue in the plaintiff's favour. The defendant's termination of the contract vide its letter dated 13 July 2010 is invalid for several reasons.

[55] The proper place to start would be cl 51 upon which the defendant had issued the notice of termination and carried out related decisions and actions. Clause 51 states:

51. PENAMATAN PENGAMBILAN KERJA KONTRAKTOR

(a) Tanpa menjejas apa-apa hak atau remedi lain yang dipunyai oleh Kerajaan, jika Kontraktor melakukan kemungkiran mengenai mana-mana satu atau lebih daripada perkara-perkara yang berikut, iaitu:

(i) jika tanpa sebab yang munasabah dia menggantung perjalanan seluruh atau mana-mana bahagian Kerja sebelum siapnya Kerja itu, atau

(ii) jika dia gagal meneruskan Kerja dengan mengikut aturan dan tekunnya, atau

(iii) jika dia gagal melaksanakan Kerja mengikut Kontrak ini atau berulangkali cuai menunaikan obligasinya di bawah Kontrak ini, atau

(iv) jika dia mungkir atau berulangkali cuai mematuhi suatu notis bertulis daripada P.P. untuk menukar dan mengganti apa-apa kerja yang cacat atau bahan atau barang-barang yang tidak sesuai, atau

(v) jika dia tidak mematuhi peruntukan-peruntukan Fasal 27 (a) dan (b) Syarat-syarat ini;

maka P.P. boleh memberi kepadanya suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran yang direkodkan menyatakan kemungkiran itu, dan jika Kontraktor samada meneruskan kemungkiran itu selama empat belas (14) hari selepas penerimaan notis itu atau pada bila-bila masa selepas itu mengulangi kemungkiran itu (samada pernah diulangi dahulunya atau tidak), maka Kerajaan boleh dengan demikian itu melalui suatu notis yang dihantar dengan pos berdaftar atau dengan serah-hantaran yang direkodkan menamatkan pengambilan kerja

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Kontraktor di bawah Kontrak ini.

[56] When interpreting and constructing termination clauses in particular, a strict approach ought to be adopted. This was the view expressed in *Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd* [1998] 6 MLJ 80 which was discussed with approval by the Court of Appeal in *Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd* [2007] 4 MLJ 113. Although the court in *Fajar Menyensing Sdn Bhd* was discussing about the service of the notice of termination, I am of the view that this applies with equal force when dealing with the operation and application of the whole termination clause; and not merely an aspect of it. This case is no exception. The provisions of cl 51 ought to be given a strict interpretation since its application has decisive and far-reaching implications to the relationship and contractual obligations of the contracting parties. That impact includes ending relationships, and freeing parties from their respective obligations; or conferring on them certain rights following a proper right of termination, if there is such a right.

Time is of the essence of the contract

[57] Dealing first with the defendant's contention that the contract was terminated because the plaintiff did not complete within the time agreed. Although there was no provision in the contract stipulating that time was of the essence of the contract, the defendant submitted that it was the intention of the parties that time was of the essence. Such intention can be gathered from the other provisions in the contract read together with the letter of award. Clause 39 of the contract and cl 5 of the letter of award were cited in support. Other indications included the defendant's grant of the first EOT, the issue of the three warning letters, and the issuance of the notice of breach. Therefore, when the plaintiff did not complete the works by the completion date, the defendant argued that it was entitled to terminate the contract.

[58] With respect, the court disagrees. It is not in dispute that the contract need not specifically provide by the insertion of an express clause that time be of the essence of the contract before time is of the essence. This was decided by the Federal Court in *Damansara Realty Sdn Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; [2011] 9 CLJ 257:

> Question 2 implies that it is a principle of law that in order for time to be of the essence it must be stipulated in a given contract. With respect, such an impression, whether intended or otherwise, is erroneous. On the contrary, it is trite law that a contract need not contain such a term or clause for time to be made of the essence in the same way 'that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract ... Thus, whether or not time had been intended to be of the essence would depend on the conduct and the dealings of the parties. There is no necessity in law that a

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clause making time of the essence must be expressed in any given contract. Similarly, the fact that there is a clause stating that time is to be of the essence does not ipso facto result in time being of the essence.

[59] Upon perusal of the terms and conditions of this contract, it is the court's opinion that the parties here did not intend and never intended time to be of the essence of the contract. Although cl 5 provides that the failure of the plaintiff to begin work within two weeks from the date of site possession will result in the termination of the contract; and cl 39 requires the plaintiff 'to complete all works by the Completion Date or any such further date allowed by the Defendant', that is far from saying that the parties intended time to be of the essence. These two clauses, and neither do other clauses, infer that the defendant has a right to validly terminate the contract where the plaintiff does not complete by the completion date or any such further date allowed by the defendant. In the first place, cl 5 is not available to the defendant as the termination was never for that reason at all nor was it ever relied on by the defendant at the material time. Secondly, cl 39 merely creates an obligation on the plaintiff to complete all works by the date agreed or extended agreed date. It does not create a parallel right to terminate. That right is housed in cl 51 which is set out above.

[60] Furthermore, the evidence show that even if the plaintiff had commenced work late, that is irrelevant since the defendant itself never found that to be a problem or a hindrance. In fact, as will be seen later when dealing with the matter of the drawings and the EOT, that the progress of the works was very much hampered by drawings and the lack of coordination between the defendant's various consultants. DW3 confirmed that M&E gave the last set of drawings on 17 June 2012. Although DW3 told the court that these drawings had no impact on the progress of the plaintiff's works as the drawings had already been given to the plaintiff as far back as in November 2009, the evidence points to the defendant itself directing the provision of those detailed drawings.

[61] I must add that cll 39, 40 and 41 are clear indications that the parties never intended time to be of the essence. While the time for completion of the works was important, it was not to the extent of rendering it to be the essence of the contract thereby conferring upon the innocent party the right to treat the non-perfomance by such date or time as an act of repudiation. That innocent party has only a right to claim damages for the breach but does not have a right to terminate the contract.

[62] Similarly, that is the case with cl 39 which talks about completion either by or on the completion date or such other date as may be extended; while cl 40

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provides for the payment of LAD in the event of delayed completion. Clause 41 on the other hand, provides for completion of parts of the works. In fact, the presence of cl 40 '*providing for the payment of a sum ... as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract point to time not being of the essence*'. This view was expressed by the Federal Court in *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M-Concept Sdn Bhd* [2010] 1 MLJ 597 at p 620; [2010] 1 CLJ 269 at p 295 where after examining the relevant authorities, the Federal Court expressed the following:

> ... In my judgment, while individual contracts will fall to be interpreted in accordance with their own terms, it is a useful guide to construction that a stipulation as to time must be read along with other provisions of the contract to determine if time is truly of the essence of the contract. Further a clause providing for the payment of a sum whether as a fine, a penalty or as liquidated damages calculated on a daily basis for the period that the work undertaken remains unfinished on the expiry of the time provided in the contract would, in the absence of a contrary intention to be gathered from the contract point to time not being of the essence.

[63] Further along, the Federal Court reminded that the interpretation of a private contract '*is not confined to the four corners of the document*'. The interpreting court '*is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract. See, Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 All ER 98.' In *Berjaya Times Square Sdn Bhd*, the Federal Court noted that there were two clauses at play. One that provided for the payment of LAD; the other specifically providing for time to be of the essence of the contract. After applying the guidelines just espoused, the court said at p 622 (MLJ); p 297 (CLJ):

> A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.

[64] It is noted that while the Federal Court in another case, that is, *Damansara Realty Sdn Bhd v Bungsar Hill Holdings Sdn Bhd & Anor*, p 479 (MLJ); p 273 (CLJ), had also expressed the view that '... *it is trite that there is a prima facie acceptance that in commercial contracts, time would be of the essence* ...'

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and that '*That rule, in our view, applies with even greater force in construction contracts*'. Nevertheless, the Federal Court had gone on to add that the rule:

> ... can of course be rebutted if the parties indicate otherwise by words or conduct, but for a starting point, it must be assumed that the parties intended time to be of the essence. It would not make much commercial sense otherwise.

[65] In the present case, that starting point is rebutted. Not only is there cl 40 on the payment of LAD, there is also cl 51 on termination. The court cannot accept that by the mere giving of an extension of time, the issue of the letters of warning and the notice of breach, the parties had intended that time was of the essence. Time is not of the essence of this contract. At best, these are evidence of the defendant not accepting the performance or alleged lack of performance by the plaintiff. The breach of these matters do not confer on the defendant a right to terminate the contract merely because of non-completion by the completion date. The defendant would only be entitled to damages for such a breach, if the grounds are proved true.

[66] As pointed out, the right to terminate is provided in cl 51. Under cl 51, the right to terminate arises where the plaintiff has breached the contract in any of the five circumstances specified in cl 51(a)(i) to (v). Even then, the breach does not ipso facto afford the defendant a right to terminate. From the terms of cl 51, it is the clear intention of the parties that the right to terminate arises only where the breach persists after a notification has been issued. Alternatively, it is the repeat of that breach at a later period (*sama ada pernah diulangi dahulunya atau tidak*) that will afford the defendant that right of termination. This can also be readily inferred from the words '*dan jika Kontraktor samada meneruskan kemungkiran itu selama empat belas (14) hari selepas penerimaan notis itu atau pada bila-bila masa selepas itu mengulangi kemungkiran itu (samada pernah diulangi dahulunya atau tidak)*'.

[67] A breach can be said to persist where it is not remedied or addressed despite being advised or told to do so; and that can only be done after a party has been notified of the breaches. In the absence of these conditions, there is no such right and any purported termination must be improper and invalid.

[68] Where any one or more of the five circumstances presents, the defendant is obliged to issue the plaintiff with a notice sent by AR registered mail wherein the particulars of the breach have to be detailed. It is my view that details of the breach must be set out in the notice. It is further the view of this court that the notice is not a perfunctory requirement but mandatory and intended to be informative. Otherwise, the breach or the complaint of the defendant cannot be remedied or addressed. It is the threat of a termination in cl 51 which, at least on paper, is suppose to spur the defaulting party to 'clean up his act or get his act together'; remedy the breach and bring the works in line

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with the terms of the contract. Therefore, the first notice under cl 51 is in fact a notice of breach. It is the violation or the non-compliance of this notice of breach that gives rise to the right to terminate; and not otherwise.

[69] In answering the first issue one must therefore see if cl 51 has been complied with; especially whether a notice of breach was issued prior to the letter of termination. If such a notice exists, its contents would be of utmost significance. But first, this is what the first letter of termination dated 13 July 2010 issued by the defendant state:

NOTIS PENAMATAN PENGAMBILAN KERJA KONTRAKTOR

Rujukan : UPNM (JPP) 03.01/66(20)

Tarikh : 13 Julai 2010

Kepada : DC CONTRACTOR SDN BHD
No. 8, No. 8, Suasana 8A
Templer Park Resort
48000 Rawang, Selangor

(Kontraktor)

(Berdaftar dengan PKK dalam Kelas 'C'

Bertaraf Bumiputra/Bukan Bumiputra)

Kontrak untuk: CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN BALAI PENGAWAL, PONDOK PENGAWAL, SETOR SENJATA DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGAI BESI, KUALA LUMPUR

KontrakNo: UPNM/JPP/T/15-09 Harga Kontrak: RM4,950,810.00

Tarikh Milik Tapak Bina: 14 Julai 2009 Tarikh Siap Kerja: 25 Januari 2010

Lanjutan Masa No. 1: 30 Jun 2010

Surat kami (ruj no. UNPNM (JPP) 033.01/66 (Vol.6)(73)), bertarikh 23 Jun 2010 adalah dirujuk.

2. Dukacita diperhatikan bahawa tuan masih didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan tidak dapat disiapkan pada Tarikh Siap Kerja Baru yang telah ditentukan pada 30 Jun 2010. Kerja tuan sepatutnya sudah 100% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 61%. Kegagalan tuan masih berulang sungguhpun tuan telah diberi Notis Kemungkiran Kontraktor yang bertujuan untuk penamatan pengambilan kerja kontraktor seperti yang tersebut di atas.

3. Maka sejajar dengan Fasal 51 Syarat-syarat Kontrak, pengambilan kerja tuan adalah dengan ini *DITAMATKAN*.

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4. Tuan hendaklah dengan serta-merta memberhentikan semua pekerjaan di tempat kerja, memindahkan kakitangan dan pekerja dari Tapak Bina dan menyerahkan pemilikan Tapak Bina itu dengan meninggalkan semua bangunan sementara, loji, perkakas, kelengkapan, barang-barang dan bahan takpasang di Tapak Bina dan Tapak Bina hendaklah dikosongkan pada atau sebelum 16 Julai 2010 ini.

5. Kerja akan disiapkan sejajar dengan Fasal 51(c) Syarat-syarat Kontrak, dan tuan adalah dikehendaki menanggung segala perbelanjaan berlebihan yang akan timbul akibat dari penamatan pengambilan kerja tuan.

Sekian harap maklum.

KEWAJIPAN, MARUAH, INTEGRITI

Saya yang menjalankan tugas,

t.t.

SHAHIDA JAAFAR

Pengarah,

Jabatan Pembangunan & Penyelenggaraan

Salinan kepada:

BENDAHARI

Bendahari

Pejabat Bendari UPNM

DAMANSARA ARCHITECT

65, Jalan 14/29

Petaling Jaya

46100 Selangor Darul Ehsan

JURUUKUR BAHAN HRM

39-1, Jalan 5/38D Taman Sri

Sinar, Segambut 51200 Kuala Lumpur

[70] According to this letter of termination, the defendant had terminated the contract because the plaintiff '*masih didapati tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan tidak dapat disiapkan pada Tarikh Siap Kerja Baru yang telah ditentukan pada 30 Jun 2010. Kerja tuan sepatutnya sudah 100% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 61%. Kegagalan tuan masih berulang sungguhpun tuan telah diberi Notis Kemungkiran Kontraktor yang bertujuan untuk penamatan pengambilan kerja kontraktor seperti yang tersebut di atas*'. In essence, the plaintiff is said to have not completed the works under the contract by the completion date of 30 June 2010. The plaintiff was said to have only achieved 61% progress when it should be at the level of 100%.

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[71] In accordance with cl 51, these matters of the level of completion must have already been specified in the notice of 23 June 2010; and that despite such notice, the breach has continued or persisted. If that is the position, then the defendant rightly can terminate the contract. It is now imperative that the terms of the notice dated 23 June 2010 be examined. This is what it states:

NOTIS KEMUNGKIRAN KONTRAKTOR

Rujukan : UPNM (JPP) 03.01/66(20)

Tarikh : 13 Julai 2010

Kepada : DC CONTRACTOR SDN BHD
No. 8, No. 8, Suasana 8A
Templer Park Resort
48000 Rawang, Selangor

(Kontraktor)

(Berdaftar dengan PKK dalam Kelas 'C'

Bertaraf Bumiputra/Bukan Bumiputra)

Kontrak untuk: CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN BALAI PENGAWAL, PONDOK PENGAWAL, SETOR SENJATA DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGAI BESI, KUALA LUMPUR

KontrakNo: UPNM/JPP/T/15-09 Harga Kontrak: RM4,950,810.00

Tarikh Milik Tapak Bina: 14 Julai 2009 Tarikh Siap Kerja: 25 Januari 2010

Lanjutan Masa No. 1: 30 Jun 2010

Merujuk kepada perkara di atas dan surat-surat amaran tentang kelewatan kerja di tapak oleh dari Wakil Pegawai Kuasa kami seperti rujukan di bawah:-

a) Amaran No. 1 : DA/UPNM/535/DCCCB/23, bertarikh 4 Februari 2010;
b) Amaran No. 2 : DA/UPNM/535/DCCSB/25, bertarikh 12 Mac 2010; dan
c) Amaran No. 3 : DA/UPNM/535/DCCSB/31, bertarikh 26 Mei 2010

(sila masukkan tarikh & rujukan surat berkaitan dengan amaran yang dikeluarkan oleh Wakil P.P)

2. Adalah didapati bahawa tuan telah:-

a) Mengikut Fasal 51(a)(ii): Gagal meneruskan kerja dengan mengikut aturan dan tekunnya berdasarkan penilaian kerja di tapak, Wakil Pegawai Penguasa pihak kami telah mendapati terdapat beberapa perkara terutama yang tidak melibatkan kerja-kerja mekanikal dan elektrikal sehingga kini masih tidak menunjukkan kemajuan memandangkan tempoh Lanjutan Masa no. 1 akan berakhir pada 30.06.2010. Kerja-kerja yang dimaksudkan adalah:

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i. Dinding Penahan dan Kemasan untuk 'Feature Wall'

Berdasarkan Mesyuarat Tapak no. 22, pihak Tuan telah berjanji akan menyiapkan kerja pada 5.06.2010. Namun sehingga kini, dinding tersebut terbiar tanpa sebarang kemajuan. Begitu juga dengan keadaan dinding penahan yang hingga kini masih belum disiapkan sepenuhnya terutama bahagian 'capping beam'. Berdasarkan Jadual Kerja terbaru yang dikemukakan oleh pihak Tuan no. ruj: *DC/M4/DA/107* bertarikh 3.02.10, kerja-kerja ini sepatutnya telah disiapkan sejak 28.02.10 lagi.

ii. Kerja-kerja Konkrit di Stor Senjata

Pihak Tuan didapati masih belum menyiapkan kerja-kerja membina 're beam' seterusnya melambatkan kerja-kerja pemasangan 'roof truss' pada bangunan tersebut.

iii. Kerja-kerja Pemasangan 'Cladding' dan Kemasan Luar di Balai Pengawal

Berdasarkan Mesyuarat Tapak no. 22, pihak Tuan telah berjanji akan menyiapkan kerja pada 12.06.10. Namun sehingga ke hari ini tiada sebarang kemajuan direkodkan dan secara tidak langsung mengakibatkan kerja-kerja kemasan luaran pada aras tanah tidak dapat dimulakan. Dengan merujuk kepada Jadual Kerja yang dikemukakan, kerja-kerja pemasangan 'cladding' sepatutnya telah disiapkan pada 2.04.10. Oleh yang demikian, di dalam surat tunjuk sebab daripada pihak Tuan no. ruj: *DC/M4/DA/143* bertarikh 2.06.10, pihak Tuan memaklumkan terdapat kesulitan untuk membawa masuk bahan binaan ('cladding') ke tapak yang mana alasan tersebut tidak dapat diterima memandangkan prosedur keluar masuk kem telah lama dimaklumkan.

iv. Pemasangan Tangga di Balai Pengawal

Hingga ke hari ini, pihak Tuan didapati gagal memasang tangga jenis 'mild steel' di Balai Pengawal walaupun kerja-kerja untuk item tersebut dibuat di kilang. Berdasarkan surat maklum balas daripada pihak Tuan no. ruj: DC/MA/DA/143 bertarikh 2.06.2010, menyatakan bahawa tangga tersebut telah dihantar pada 26.05.10 dan kerja-kerja akan dimulakan secepat mungkin. Walau bagaimanapun, berdasarkan pemantauan Wakil Pegawai Penguasa kami mendapati sehingga tarikh 16.06.2010, struktur tangga tersebut masih tidak kelihatan di tapak.

v. 'Flight Light'

Pihak Tuan didapati masih belum memulakan kerja-kerja pemasangan 'flight light' di kawasan bersebelahan Setor Senjata walaupun lukisan daripada Tetuan Mohd. Asbi & Associates dan Tetuan EMZEX Consulting Engineers telah lama diberikan.

b) Fasal 51 (a)(i): Jika tanpa sebab yang munasabah Kontraktor menggantung perjalanan seluruh atau mana-mana bahagian Kerja sebelum siapnya Kerja itu.

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c) Fasal 51(a)(iv): Mungkir dan berulangkali cuai mematuhi notis bertulis daripada Wakil Pegawai Penguasa.

Secara umumnya, kami mendapati pihak Tuan gagal membekalkan tenaga kerja yang mencukupi di tapak walaupun sebelum surat amaran daripada Wakil Pegawai Penguasa dikeluarkan. Ingin dinyatakan di sini, antara perkara yang dibangkitkan di dalam surat amaran ialah berkenaan kekurangan tenaga kerja yang secara jelas tidak menampakkan sebarang kemajuan di tapak bina.

3. Dengan ini notis adalah diberikan bahawa sekiranya tuan masih meneruskan kemungkiran tuan selama 14 hari selepas penerimaan Notis ini atau pada bila-bila masa selepas ini mengulangi kemungkiran tersebut, pengambilan kerja tuan di bawah kontrak ini akan ditamatkan sejajar dengan Fasal 51 Syarat-syarat Kontrak. Tuan adalah diingatkan iaitu sekiranya pengambilan kerja tuan ditamatkan kerja akan disiapkan sejajar dengan Fasal 51(c) Syarat-syarat Kontrak dan segala perbelanjaan berlebihan yang terlibat hendaklah ditanggung sepertinya oleh tuan.

KEWAJIPAN, MARUAH, INTEGRITI

Saya yang menjalankan tugas

tt

SHAHIDA JAAFAR

Pengarah

Jabatan Pembangunan & Penyelenggaraan

[72] It is not in dispute that the plaintiff received this notice of breach on 29 June 2010 and had responded vide letter dated 30 June 2010 found at p 125 of bundle B. Despite this response, the defendant terminated the contract on 13 July 2010. Although the termination was later purportedly effected on 16 July 2010, cl 51 requires there to be continuous breach or a breach to continue 14 days after the receipt of the notice. Since the notice was only received on 29 June 2010, and the termination was affected on 13 July 2010 (according to the contents of this letter), there is also non-compliance of cl 51 as the termination was issued on the 14th day. On this ground alone, it may be said that the termination is improper, invalid and of no effect.

[73] Further, applying the strict rules of interpretation and construction, the letter of termination and the notice of breach must relate to common matters. Since the letter of termination talks about the plaintiff being found to '*tidak menjalankan kerja dengan bersungguh-sungguh dan kerja tuan tidak dapat disiapkan pada Tarikh Siap Kerja Baru yang telah ditentukan pada 30 Jun 2010. Kerja tuan sepatutnya sudah 100% siap tetapi kemajuan yang dicapai setakat ini adalah hanya 61%*', the notice of breach ought to refer to the same or similar matters.

[74] A quick perusal of the notice of breach will readily reveal the chasm and the disparities between the matters raise in the letter of termination and the

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notice of breach. In the letter of termination, the defendant alleged that the plaintiff was still found to have not satisfactorily carried out the works and that the works had not been completed by the new date of completion, that is, by 30 June 2010. The progress of the works should have been at 100% completion; instead it was only at 61%. This was said to be a repeated failure in view of earlier warnings issued. These matters were however, not raise in the notice. Obviously because at that time, the completion date of 30 June 2010 had yet to come to pass. While a termination can be for an anticipatory breach, that was not the purport of the notice or even the letter of termination. The termination is evidently because the plaintiff is said to have failed to complete by 30 June 2010 for which no notice of breach had been issued.

[75] The notice refers to different matters. In particular, the defendant had relied on cl 51(a)(i), (ii) and (iv); that is, that the plaintiff '(i) jika tanpa sebab yang munasabah dia menggantung perjalanan seluruh atau mana-mana bahagian Kerja sebelum siapnya Kerja itu'; '(ii) jika dia gagal meneruskan Kerja dengan mengikut aturan dan tekunnya'; and '(iv) jika dia mungkir atau berulangkali cuai mematuhi suatu notis bertulis daripada P.P. untuk menukar dan mengganti apa-apa kerja yang cacat atau bahan atau barang-barang yang tidak sesuai'.

[76] Since the breaches mentioned in this notice of breach differ from those found in the letters of warning, it is the court's findings that the termination is bad and not in accord with cl 51. When the termination is not in accordance with the terms and conditions agreed between the parties as found in cl 51, the termination is invalid and ineffective — see Court of Appeal's decision in *Pernas Construction Sdn Bhd v Syarikat Rasabina Sdn Bhd* [2004] 3 AMR 635.

[77] Even if the court is wrong in this regard, it is the finding of this court that the alleged breaches had been duly accounted for by the plaintiff; and the defendant actually had no right to terminate the contract.

[78] As mentioned earlier, the notice had identified various breaches under cl 51. Insofar as the breach under cl 51(a)(i) and (iv) were concerned, no details were given although it may be suggested that in the case of cl 51(a)(iv), it must necessarily refer to the failure to comply with the earlier three notices or warnings. There are however, no details of how the plaintiff may be said to have '*Jika tanpa sebab yang munasabah Kontraktor menggantung perjalanan seluruh atau mana-mana bahagian Kerja sebelum siapnya Kerja itu*.' It is difficult to understand how the plaintiff is supposed to attend to such a breach if none were given.

[79] However, in relation to a breach of cl 51(a)(ii), the progress of several works were identified; namely, work on the feature wall; concrete work at the

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ammunition store; cladding, exterior work and stairs at *bilik pengawal*; and work on the flight light (flood lights). The defendant was of the view that the plaintiff had failed to proceed with the works regularly and diligently either because the work was either slow, not in compliance with the works programme or had not started despite the plaintiff being given the relevant drawings; or because these works had not met agreed datelines.

[80] In its written response which was received by the defendant, the plaintiff first indicated that it had replied to all the earlier warnings. While it admitted that there were delays, it took the position that such delays were covered under cl 43(f) of the contract in that the delays were occasioned by the defendant or defendant's SO (Damansara Architect) in giving instructions, plans etc in order that the plaintiff may proceed with the works. The plaintiff further addressed each and every of the areas of works identified by the defendant, providing documents in support of its responses.

[81] On this aspect, it is the court's view that the earlier notices cannot be relied on not just for the reasons cited by the plaintiff; which the court agrees but because not all of those earlier notices were sent under the mandates of cl 51. This is particularly the case with the first letter of 4 February 2010.

> 4 Februari 2010
>
> Tuan,
>
> CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN:
>
> — Balai Pengawal
>
> — Pondok Pengawal
>
> — Stor Senjata
>
> DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGEI BESI KUALA LUMPUR *Ketiadaan Aktiviti di Tapak Pembinaan*
>
> Merujuk kepada lawatan tapak pada 3hb. Februari 2010, jam 10.30 pagi bersama En. Samat bin Darus (Tetuan UPNM—Kerani Tapak), Kapt. Ab. Azih bin Ab. Ghani (Tetuan DC Contractors) dan pihak kami diwakili oleh Pn. Siti Rashiqah binti Mohd. Yusop.
>
> Pihak kami dengan ini mendapati semasa lawatan dijalankan, tiada sebarang aktiviti berlaku di tapak pembinaan berikutan ketiadaan pekerja pada ketika itu. Situasi ini berlarutan hingga ke hari ini apabila pihak kami dimaklumkan oleh En. Hazri Azmin daripada Tetuan Mohd. Asbi & Associates yang mengadakan lawatan pagi ini.
>
> Oleh yang demikian, pihak Tuan diminta untuk mengemukakan sebab mengapa keadaan ini berlaku selewat-lewatnya pada minggu ini.
>
> Sekian, terima kasih.
>
> Yang benar,

JOBNAME: No Job Name PAGE: 32 SESS: 1 OUTPUT: Mon Oct 13 16:19:03 2014

DAMANSARA ARCHITECT

t.t.

.....

SITI RASHIQAH BINTI MOHD. YUSOP

Project Architect

c.c. JPP-UPNM (Pn. Shahida)

Mohd. Asbi & Associates — En. Hazri Azmin

[82] As can be seen from Damansara Architect's first letter dated 4 February 2010 (see p 66 of bundle B1) captioned 'Ketiadaan Aktiviti di Tapak Pembinaan', Damansara Architect referred to a site visit on 3 February 2010 at 10.30am where it had found that there was no activity at the site. By this, it meant that there were no workers at the site. It sought an explanation as to why the situation '*berlarutan hingga ke hari ini apabila pihak kami dimaklumkan oleh Encik Hazri Azmin daripada Tetuan Mohd Asbi & Associates yang mengadakan lawatan pagi in*i'. There is no mention of any termination under cl 51 in this letter. The court is of the view that this letter may not be cited and relied on for a termination under cl 51 as there was no such reliance or intention in the first place. The matter of termination was far from the defendant's mind at the material time. For the earlier notice to be relevant and valid, the plaintiff's attention must have been specifically drawn to the ambit and application of cl 51. Since there was none, a termination based on this first letter would be improper and wrong.

[83] These are the two subsequent letters, the first issued on 12 March 2010, the other on 26 May 2010:

12th March 2010

Tuan,

CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN:

-Balai Pengawal

-Pondok Pengawal

-Stor Senjata

DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGEI BESI KUALA LUMPUR

Reluctant to Complete the Works — Warning No. 2

Site Meeting no. 16 dated 9th March 2010 at UPNM Site Office to be referred.

We wish to highlight that the progress of work are extremely slow for the above project. There is not much improvement since our last written warning to your good office dated 4th February 2010 (letter ref. no: DA/UPNM/535/DCCSB/23). It seemed our warning went unheeded.

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Based on our last observation during the Site Meeting, all works at site did not resembles as the Work Programme no. 2 which you have submitted to us on the 3rd February 2010 (letter ref. no: DC/M4/DA/107). As to date, by referring to the Work Programme you are supposed to complete the cement rendering at digital clock level for the Guard House. As for the Armory Store the works should now at the stage of tilling the contractor area.

However, the actual progress still persists at a painfully slow and unacceptable rate. As for the Guard House the workers are still layering bricks at the ground floor level while there is no activity or works been done for the Armory Store and Retaining Wall.

Your reluctance the complete the work even though instructions have been issued will result in the determination of the contract based on *Fasal 51(a) (ii)* under the '*Syarat-syarat Kontrak*'. Please forward a detail report of your delay for our further action.

Thank you.

Yours sincerely,

DAMANSARA ARCHITECT

b/p

sgd

.....

WAN MOKHTAR BIN DATO' WAN MOHAMED

Project Director

c.c	JPP-UPNM	:	Pn. Shahida bt. Jaafar
	Mohd. Asbi & Associates	:	En Hazri Azmin bin Md. Salleh
	EMZEX Consulting Engineers	:	E. Khil/En. Izzuddin/En. Ikram
	Jurukur Bahan HRM	:	En. Rosdi bin Hj. Mohamed

26th May 2010

Tuan,

CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN:

— Balai Pengawal

— Pondok Pengawal

— Stor Senjata

DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGEI BESI KUALA LUMPUR Warning no. 3 — *Slow Work Progress at Site*

Site Meeting no. 20 dated 4th May 2010 and Site Meeting no. 21 dated 18th May 2010 to be referred. We also wish to put in record a tele-conversation made by Cik Irwani Hasmizawati bt. Samad from Messr. UPNM to our Pn. Siti Rashiqah bt. Mohd. Yusop on 25.05.10 informing there is no progress and activity been held at Guard House and a site visit today by the undersigned architect.

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We wish to highlight that the progress of work are extremely slow for the above project since the target completion date have been extended to the 30th June 2010. There is not much improvement since our last site meeting. By referring to the minutes of meeting, your representatives had assured the client to complete a few works last week:

1. *Feature wall*

During Site Meeting no. 20, DC Contractor had promised the client, Pn. Shahida to complete the feature wall by 15.05.10. But up to this date, the wall was left bare without any finishes.

2. *Cladding at Guard House*

By referring to Site Meeting no. 20, DC Contractor had also promised Pn. Shahida to complete the cladding works latest by 22.05.10 due to 2 weeks duration for installation. Until today no progress been captured since our last Site Meeting no. 21. Due to your slow progress on installing the cladding, you have delayed to start the ground floor external finishes for Guard House (*by Suzuka — TL Effect*) which supposed to start on the 24.05.10.

3. *Staircase at Guard House*

Ms. Staircase with rc. slab steps have not been constructed since this is a stand alone item and not related with any M&E works.

Your reluctance to complete the work even though instructions have been issued will result in the determination of the contract based on *Fasal 51(a) (ii)* under the '*Syarat-syarat Kontrak*' since there will be no more extension of time be granted after the 30th June 2010. Please forward a detail explanation of your delay for our further action.

Thank you.

Yours sincerely,

sgd

.....

SITI RASHIQAH MOHD. YUSOP

Project Architect

c.c	JPP-UPNM	:	Pn. Shahida bt. Jaafar
	Jurukur Bahan HRM	:	En. Rosdi bin Hj. Mohamed

[84] Damansara Architect had captioned its second letter dated 12 March 2010 (see p 72 of bundle B1) as 'Reluctant to Complete the Works — Warning

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No. 2'. In this letter, Damansara Architect, inter alia, warned the plaintiff that its 'reluctance to complete the works even though instructions have been issued will result in the determination of the contract based on Fasal 51(a)(ii) under the 'Syarat-Syarat Kontrak'.' The works identified here were the cement works around the digital clock level for the guard house, tiling works at the armory store and works on the retaining wall. Damansara Architect then sought a detail report of the delay from the plaintiff.

[85] In its third letter dated 26 May 2010 (see p 84 of bundle B1) this time captioned 'Warning No. 3 — Slow Work Progress at Site', the works identified were works on the feature wall, cladding at the guard house, and works on the staircase at the guard house. Once again, the defendant warned of a termination under cl 51(a)(ii). As before, Damansara Architect sought a detail explanation for the delay.

[86] It is the plaintiff's case that it had accounted for the matters complained of in those letters. That being so, it is not open to the defendant to rely on the letters. The court agrees.

[87] It cannot be overlooked that the defendant approved the first EOT on 31 May 2010. The grounds relied on for the grant of this EOT (p 99 of bundle B) involved substantially the matter of drawings which were either late or still forthcoming from the defendant's consultants. These reasons put forth by the plaintiff (pp 1–3 of bundle B) were accepted by the defendant. I note that the parties have agreed that there was an absence of the drawings for the due execution and completion of the works under the contract; and that the provision of such drawings was the defendant's responsibility (through its consultants). Since the defendant had approved the plaintiff's application for an EOT pursuant to cl 43(f) of the contract on, inter alia, the delay on the part of its consultants in the issuance of drawings, which drawings included those affecting the armory store, retaining wall, feature wall, and guard house, furnished to the plaintiff as late as June 2010, the defendant therefore had no basis for the termination.

[88] This is what cl 43(f) state:

> 43. KELAMBATAN DAN LANJUTAN MASA
>
> Apabila didapati dengan munasabahnya jelas bahawa kemajuan Kerja terlambat, Kontraktor hendaklah dengan serta merta memberi notis bertulis menyatakan sebab-sebab kelambatan kepada P.P. dan jika pada pendapat P.P. penyiapan Kerja itu mungkin dilambatkan atau telah terlambat melebihi Tarikh Siap yang dinyatakan dalam Lampiran atau melebihi mana-mana Tarikh Siap lanjutan yang ditetapkan dahulunya di bawah Syarat ini:

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(a) oleh kerana force majeure, atau

(b) oleh sebab ...

(c) oleh sebab arahan-arahan ...

(d) ...

(e) ...

(f) oleh sebab Kontraktor telah tidak menerima dalam masa yang wajar daripada P.P. arahan, pelan, aras yang diperlukan atau arahan berkenaan dengan penamaan subkontraktor dan atau penamaan pembekal yang diperuntukkan dalam Kontrak ini berpunca dari apa-apa kecuaian atau kemungkiran oleh P.P. dan yang Kontraktor telah dengan khususnya memohon secara bertulis pada suatu tarikh yang berasaskan kepada Tarikh Siap yang dinyatakan dalam Lampiran kepada Syarat-syarat ini atau kepada apa-apa lanjutan masa yang ditetapkan pada masa itu di bawah Syarat ini, tidaklah semunasabahnya terlalu jauh atau terlalu dekat dengan tarikh arahan, pelan atau aras tersebut perlu diterima olehnya, atau

(g) ...

(h) ...

(i) ...

(j) ...

(k) ...

maka P.P. hendaklah, sebaik sahaja dia dapat menganggarkan berapa lama kelambatan itu melewati tarikh atau masa yang tersebut itu, memberi secara bertulis suatu lanjutan masa yang adil dan berpatutan untuk menyiapkan Kerja, dengan syarat sentiasanya bahawa Kontraktor hendaklah sentiasa berusaha sedaya-upayanya untuk mengelakkan kelambatan dan hendaklah membuat apa-apa sahaja yang dikehendaki dengan munasabahnya sehingga memuaskan hati P.P. untuk meneruskan Kerja. Perakuan yang dikeluarkan oleh P.P. di bawah Syarat ini hendaklah disebut 'Perakuan Kelambatan dan Lanjutan Masa'.

[89] Under these circumstances, it is unreasonable for the defendant to have terminated the contract. In fact, the documentary evidence before the court, especially the minutes of the site meetings, is replete with evidence of the defendant being displeased with its own consultants, whether in respect of their numerous delays in attending to the matters pending or giving the required information to the plaintiff so that the plaintiff may execute the works; or because of the lack of co-ordination between all the consultants. The defendant is frequently seen reminding Damansara Architect to coordinate actions and ensure timely actions between the consultants. The defendant's displeasure is

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quite palpable in their letters to Damansara Architect; as well as to the other consultants. Similarly, its reproach of the same as recorded in the numerous site meetings.

[90] See for example the defendant's letters to its consultants dated 29 January 2010, 8 April 2010 and 15 April 2010 at pp 9, 17 and 20 of bundle B. The delays in relation to the drawings (lack of drawings and delays in supplying amended drawings are not disputed) was a very real problem to the extent that the defendant, through DW1, personally wrote to Mohd Asbi & Assoc (MAA) on 15 April 2010 stating:

> ... sehingga kini masih terdapat lukisan pembinaan tidak dikeluarkan kepada pihak kontraktor. Kelewatan kontraktor menerima lukisan pembinaan yang dipohon secara langsung akan melewatkan perjalanan projek di atas. 2. Sehubungan dengan itu diharap pihak tuan dapat memastikan semua lukisan pembinaan dapat dimajukan kepada pihak kontraktor seperti yang dijanjikan oleh pihak tuan semasa mesyuarat bersama pihak kami pada 1 April 2010 yang lalu.

[91] The defendant cannot ignore the fact that any delay or default on the part of its consultants is attributable to the defendant. Given that the drawings were provided in the manner and time as described by PW1, whose evidence I have no reason to doubt, the defendant simply has no basis to terminate the contract. Such a termination would be invalid and unlawful.

[92] In any case, even assuming for a moment that the defendant's termination is on the basis of a lack of manpower at the work site, there is the evidence to the contrary coming no less than from one of the defendant's own consultants; HRM (QS) in its letter dated 8 July 2010 found at p 118 of bundle B. The defendant has urged the court to disregard this evidence citing that this consultant is not the authorised or appropriate person to give this opinion.

[93] With respect, the court disagrees. HRM is one of the defendant's consultants. What is important is whether it in fact carried out the site visit and, what were its findings. It would appear from the evidence and the defendant's case that the truth of the site visit is not in doubt; and more importantly, neither are the findings of HRM. HRM found that there were adequate manpower and improvement in the progress of the works. The court does not put any stock to the defendant's contention that this consultant was not authorised to offer views or make any findings. The evidence actually shows not only has this consultant but the other consultants too, have given views and have communicated with the plaintiff directly without going through the SO or Damansara Architect. See for example, HRM's letter to the plaintiff dated 17 June 2010 on the first EOT (p 96 of bundle B); MAA's letter to the plaintiff dated 26 April 2010 on the drawings and other related matters (p 24 of bundle

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B); and Emzex or the M&E's letter dated 5 JMay 2010 to the plaintiff also in relation to drawings (p 48 of bundle B).

[94] Finally, in the matter of the progress of the plaintiff's works, the issue is whether the plaintiff had only completed 61% of the works at the material time as alleged by the defendant through the testimony of DW1. In this regard, the court accepts the evidence of PW1 that the plaintiff had indeed completed 85% of the works. At the site meeting of 25 January 2010 where the defendant and its consultants were present, the record shows that the plaintiff had completed 80.56% — see p 281 of bundle B. This was confirmed by DW4 in his evidence while DW1 was not able to offer any explanation on the discrepancy. The court is unable to accept the defendant's contention that the plaintiff had only completed 61% of the works given that even in a meeting as late as 26 August 2010 when the defendant was attempting compliance with *Surat Pekeliling Perbendaharaan* No 8/2009 (see p 48 of bundle B1), the outstanding works was said to be at 35.5% as at 16 August 2010. It is quite apparent that the defendant is uncertain as to the level of progress of the plaintiff's works under the terms of the contract. To a large extent, this must be due to the extensive and pervasive lack of coordination between the defendant's consultants as discussed earlier.

[95] Under such circumstances and with the presence of firm contemporaneous documentary evidence which emanate from the defendant itself, the court cannot find any basis or justification for the defendant's allegation on the level of progress of the works under the contract. In the light of all this evidence including evidence from the defendant's own consultants, the court cannot find any justification for the defendant's termination of the contract. The plaintiff had indeed proceeded regularly and diligently with the works. By '*regularly and diligently*', the parties are not in dispute as to the meaning and interpretation to be ascribed as decided in *West Faulkner Associates v London Borough of Newham* (1994) 422 ConLR 144. From the evidence, it must be said that the plaintiff had proceeded '*continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contractual requirements as to time, sequence and quality of work*.'

[96] A further reason why the first termination is invalid is the non-compliance of the guidelines issued by the Ministry of Higher Education, as evidenced by the defendant's own conduct of retraction. It is undisputed that the first letter of termination was withdrawn by reason of the Ministry of Higher Education's letter. The defendant was informed by the Ministry of Higher Education that its letter of termination was not in compliance with its guidelines. This is what was stated in the Ministry's letter:

Ruj. Kami : KPTP.(S)100-16/3/40 (13)

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Tarikh : 4 Ogos 2010

Y.Bhg. Dato' Wira Allatif Bin Mohd Noor

Naib Canselor

Universiti Pertahanan Nasional Malaysia

Kem Sungai Besi

57000 Kuala Lumpur

Y.Bhg. Dato'.

CADANGAN MENAIKTARAF DAN PENAMBAHBAIKAN BALAI PENGAWAL, PONDOK PENGAWAL, STOR SENJATA DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGAI BESI, KUALA LUMPUR

Penamatan Kontraktor Dan Perlantikan Kontraktor Penyelamat

Saya dengan segala hormatnya diarah merujuk mengenai perkara di atas. Surat YBhg. Dato' nombor rujukan bil: UPNM (JPP) 03.01/ bertarikh 29 Julai 2010 adalah berkaitan.

2. Untuk makluman pihak YBhg. Dato'. prosedur penamatan kontraktor ini adalah tidak selaras dengan Surat Pekeliling Perbendaharaan Bil. 8 Tahun 2009, Peraturan Pelantikan Kontraktor Penyiap Bagi Projek Sakit yang dikeluarkan oleh Kementerian Kewangan Malaysia. Sehubungan itu, pihak Kementerian berpandangan agar tindakan penamatan ini hendaklah ditangguhkan sehingga Jawatankuasa Projek Sakit Kementerian Pengajian Tinggi yang dipengerusikan oleh YBhg. Tan Sri Ketua Setiausaha Kementerian bersidang bagi memperakukan kepada Pegawai Yang Dinamakan dalam kontrak untuk penamatan kontraktor selaras dengan syarat-syarat kontrak.

3. Pihak YBhg. Dato' juga dinasihatkan supaya surat penamatan kontraktor tersebut ditarik balik dan kerja-kerja kontraktor perlu diteruskan semula sebagaimana biasa. Laporan Projek Sakit sebagaimana Lampiran A, Surat Pekeliling Perbendaharaan Bil. 8 Tahun 2009 perlulah disediakan untuk makluman dan tindakan pihak Kementerian selanjutnya. Perhatian serta kerjasama pihak YBhg. Dato' berhubung perkara ini amatlah dihargai dan didahului dengan ucapan terima kasih.

Sekian.

'BERKHIDMAT UNTUK NEGARA'

t.t.

(DATO' MAHAMED BIN HUSSAIN)

Bahagian Pembangunan

b.p. Ketua Setiausaha

Kementerian Pengajian Tinggi Malaysia

s.k.

Y.Bhg. Tan Sri KSU

Y.Bhg. Dato' TKSU (B)

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KPSUK (P) P

KPSUK (P) M

Naib Canselor

Universiti Pertahanan Nasional Malaysia

Kem Sungai Besi

57000 Kuala Lumpur

(u.p.: Puan Shahida binti Jaafar)

[97] As pointed out earlier, this led to the defendant's retraction of the letter containing the first termination. This is what the defendant informed the plaintiff in its letter which was copied to the vice chancellor, Damansara Architect, the Ministry and various other parties:

Tarikh : 16 Ogos 2010

DC CONTRACTOR SDN BHD

No. 8, No. 8, Suasana 8A

Templer Park Resort 48000

Rawang, Selangor

Tuan,

CADANGAN MENAIKTARAF DAN PENAMBAHBAIKAN BALAI PENGAWAL, PONDOK PENGAWAL, STOR SENJATA DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGAI BESI, KUALA LUMPUR

Kontrak No: UPNM/JPP/T/15-09

Penamatan Balik Notis Penamatan Pengambilan Kerja Kontraktor

Adalah dengan segala hormatnya perkara di atas adalah dirujuk.

2. Adalah dimaklumkan pihak Kementerian Pengajian Tinggi (KPT) telah mengarahkan pihak kami menarik balik Notis Penamatan Pengambilan Kerja Kontraktor, di sini pihak kami mengikut arahan KPT melalui surat rujukan KPT.P.(S)100-16/3/40(13), bertarikh 4 Ogos 2010 untuk menarik balik Notis Penamatan Pengambilan Kerja pihak tuan.

3. Dimaklumkan juga pihak tuan tuan boleh menyambung kerja di tapak seperti yang termaktub di dalam kontrak. Walaubagaimana pun sebelum pihak tuan kembali ke tapak, pihak tuan dikehendaki memastikan perkara-perkara di bawah dipatuhi:

(i) Insuran kerja telah diperbaharui selaras dengan lanjutan masa yang diluluskan,

(ii) Bon Pelaksanaan telah diperbaharui selaras dengan lanjutan masa yang telah diluluskan,

(iii) Telah mendapat kebenaran masuk kem dengan pihak Markas Kem Sg. Besi,

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(iv) Memajukan program kerja bagi membolehkan kami memantau kerja-kerja yang dijalankan.

4. Suhubungan dengan itu pihak kami tidak dapat membenarkan pihak tuan atau mana-mana wakil pihak tuan memasuki tapak bina sekiranya perkara-perkara di atas tidak dipenuhi dan dipatuhi.

Sekian harap maklum.

KEWAJIPAN, MARUAH, INTEGRITI

Saya yang menurut perintah,

t.t.

SHAHIDA JAAFAR

Pengarah

Jabatan Pembangunan & Penyelenggaraan

Universiti Pertahanan Nasional Malaysia.

[98] This was the plaintiff's response copied to the relevant parties:

Tarikh : 24hb Ogos 2010

UNIVERSITI PERTAHANAN NASIONAL MALAYSIA

JABATAN Pembangunan Dan Penyelenggaraan

Bangunan Canselori, Aras 2

Kem Sg. Besi

57500 Kuala Lumpur

U/P: Puan Shahida Jaafar

Puan,

PENARIKAN BALIK PENAMATAN PENGAMBILAN KERJA KONTRAKTOR

Rujuk: Surat UPNM (JPP) 03.01/66(73) bertarikh 16 Ogos 2010.

Merujuk kepada perkara di atas kami ingin memaklumkan bahawa pihak kontraktor memohon untuk menuntut kerugian langsung dan perbelanjaan langsung yang akan ditanggung akibat dari perkara yang telah berlaku. Dalam kes ini mengikut kontrak, kontraktor tidak akan dibayar ganti rugi di bawah mana-mana peruntukan sama ada tuntutan Luar Kontrak (Extra Contractual) dan Tuntutan Belas kasihan (Ex-Gratia).

2. Permohonan ini secara tidak langsung dapat menyelesaikan masalah kewangan dan mempastikan kontraktor tidak mengalami masalah aliran tunai disebabkan sesuatu peristiwa tertentu yang telah secara jelas menjejaskan kemajuan teratur kontrator dan seterusnya menyelamatkan kontraktor dari terpaksa mengemukakan permohonan di mahkamah.

3. Pihak kami mengambil kira kos-kos berikut perlu dipertimbangkan untuk tuntutan bagi meneruskan kerja-kerja tersebut:

a. Kos pertambahan 'Preliminaries' atas tanggungan tapak.

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b. Kehilangan keuntungan

4. Pihak kami berpegang kepada fakta bahawa kontrak ini dianggap menguntungkan. Di atas pertambahan kos 'overhead' dan kehilangan keuntungan, kami mengambil perkiraan menggunakan formula berikut:

OVERHEAD/PROFIT PERCENTAGE X CONTRACT SUM X PERIOD OF DELAY / CONTRACT PERIOD

= 15%xRM4,950,810.00x4/6 = RM495,810.00

Jumlah yang kami tuntut ialah RM495,810.00

5. Bagi meneruskan semula kerja di tapak seperti yang termaktub di dalam kontrak, kami akan memastikan insuran dan Bon Pelaksanaan akan diperbaharui sejurus mendapat pengesahan lanjutan masa yang diluluskan oleh pihak puan.

6. Bersama ini juga kami majukan program kerja bagi tempoh 4 bulan untuk dianalisa oleh pihak puan dan konsultan. Selaras dengan program kerja ini kami berharap agar perkara berikut perlu dipenuhi:

a) Lukisan binaan yang lengkap dan pihak konsultan yang terlibat. Bermaksud tiada sebarang pindaan pada masa perlaksanaan.

b) Segala kerja yang melibatkan penambahan kerja perlu diteliti dan diluluskan serta disahkan terlebih dahulu sebelum kerja dijalankan. Pihak kontraktor berhak untuk mendapatkan bayaran 70 peratus dari kerja siap atas sebutharga yang dimajukan (yang mana lebih awal).

c) Pengesahan 'remeasurement cost' untuk kerja-kerja yang telah siap.

7. Kami berharap dengan cadangan yang kami majukan ini dapat dipertimbangkan oleh pihak puan dengan sewajarnya.

Sekian, terima kasih

Yang benar,

t.t.

_____

Kapten (B) Ab Azih Ab Ghani

Pengurus Projek

[99] Needless to say, the parties did not see eye to eye. As testified by DW1, the defendant was not agreeable to the plaintiff's terms. Subsequently, the defendant issued the second letter of termination which reads:

NOTIS PENAMATAN PENGAMBILAN KERJA KONTRAKTOR

Rujukan : UPNM(JPP)03.01/88(77)VOL .7

Tarikh : 25 November 2010

Kepada : DC CONTRACTOR SDN BHD

No. 8, No. 8, Suasana 8A

Templer Park Resort

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48000 Rawang, Selangor

(Kontraktor)

(Berdaftar dengan PKK dalam Kelas 'C'

Bertaraf Bumiputra/Bukan Bumiputra)

Kontrak untuk CADANGAN NAIKTARAF DAN PENAMBAHBAIKAN BALAI PENGAWAL, PONDOK PENGAWAL, SETOR SENJATA DAN JALAN MASUK UTAMA UNIVERSITI PERTAHANAN NASIONAL MALAYSIA, KEM SUNGAI BESI, KUALA LUMPUR

Kontrak No: UPNM/JPP/T/15-09 Harga Kontrak: RM4,950,810.00

Tarikh Milik Tapak Bina: 14 Julai 2009 Tarikh Siap Kerja: 25 Januari 2010

Lanjutan Masa No. 1 : 30 Jun 2010

Dengan segala hormatnya perkara di atas adalah dirujuk.

Pihak Pengawal Penguasa mendapati pihak kontraktor:-

(a) Gagal, enggan dan cuai untuk melaksanakan kerja-kerja yang telah diarahkan dan kerja tersebut tidak dapat disiapkan pada Tarikh Siap Kerja Baru yang telah ditentukan pada 30 Jun 2010.

(b) Seharusnya kerja tersebut telah mencecah 100% siap tetapi dukacita kemajuan yang dicapai hanya 60%.

2. Di atas kegagalan tuan mematuhi perkara di atas, mengikut Fasa 51(a) Syarat-syarat Kontrak maka dengan rasminya bermula dari tarikh surat ini dikeluarkan, pengambilan kerja kontraktor DC Contractor Sdn Bhd. beralamat seperti di atas adalah *DITAMATKAN*.

3. Pihak tuan (pengarah syarikat) dikehendaki hadir di tapak pada 29 November 2010, jam 10.00 pagi untuk menentukan penilaian kemajuan kerja, barang dan jentera di tapak. Jika tuan gagal menghadirkan diri pada tarikh dari masa serta tempat yang ditetapkan, maka pihak kami akan menganggap keputusan yang akan dibuat oleh perunding terbabit adalah muktamad.

4. Dalam pada itu juga, pihak tuan diminta untuk memaklumkan perkara ini kepada semua 'nominated sub-contractor' yang dilantik berkenaan penilaian seperti di atas.

Sekian harap maklum.

KEWAJIPAN, MARUAH, INTEGRITI

Yang benar,

t.t.

DATO' WIRA ALLATIF BIN MOHD NOOR

LT Jen

Naib Canselor

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[100] This letter, too, was copied to quite a few parties including the *Bendahari* of the defendant, the consultants, Inland Revenue, Kementerian Pembangunan Usahawan dan Koperasi, and Malaysian Assurance Alliance Bhd with whom the guarantee of RM247,540.50 had been arranged.

[101] It is the defendant's case that the guidelines have no force or legal effect. With respect, the court disagrees and these are my reasons.

[102] First and foremost, the defendant's conduct speaks volumes. The defendant themselves considered the guidelines to have force and effect and application to their conduct such that the defendant complied with it and withdrew or retracted their first letter of termination. This is clearly expressed in the letter of retraction, that the defendant was doing so upon the Ministry's instructions (*mengikut arahan KPT*). It is not open to the defendant to now come to court and say that it was 'out of deference' to the Ministry that the defendant did so. To do so is really an afterthought. In fact, in my view, it is mischievous on the part of the defendant to have suggested as much.

[103] For an institution such as the defendant to do what it did, in a matter as serious as a termination of a multi-million contract, the guidelines must have more than a cursory meaning and application to the decisions and actions of the defendant. Compliance of the guidelines cannot be left to 'respect', 'courtesy' or 'deference' as now suggested by the gefendant. The gefendant could have chosen to ignore the non-compliance for after all, the letter of termination had already been issued. If, like in the case of *Thong Foo Ching & Ors v Shigenori Ono* [1998] 4 MLJ 585; [1998] 4 CLJ 674, the guidelines were to have no force of law, then it was open to the defendant to disregard them, ignore the Ministry's letter; or advise the Ministry the very thing that the defendant now seeks to explain to the court.

[104] In any event, the Court of Appeal in *Thong Foo Ching & Ors* @ p 599 (MLJ); p 694 (CLJ) examined the contents of the relevant guidelines before concluding that it had no force of law, that it imposed '*a moral obligation only on those affected to comply with their provisions. At most, non-compliance can be used as a means of refusing to exercise a discretion, a purely administrative act, as was done by the directors in the David Hey's case. On the facts of the appeal before us, I consider that the learned trial judge was correct when she held that avoidance of the guidelines in the manner that was done in this case cannot be held against the respondent as to render the two agreements invalid*.'

[105] In this case, it is the court's finding that the guidelines known as *Surat Pekeliling Perbendaharaan Bil 8 Tahun 2009* do, have force and effect to the defendant. By 'force', it does not necessarily mean force of law; but application effect and compliance. The details of this *Surat Pekeliling Perbendaharaan* (SPP

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8/2009) can be found at pp 165–174 of bundle B. According to SPP 8/2009, its object is to:

> memaklumkan semua Kementerian, Jabatan dan Badan Berkanun (Agensi) mengenai peraturan dan kaedah pelantikan kontraktor bagi menyiapkan projek-projek sakit yang telah ditamatkan.

[106] It appears from SPP 8/2009 issued by the Ministry of Finance that whole purpose of the guidelines is to prescribe certain procedures that must be followed before 'projek sakit' may be terminated and new contractors appointed to complete the works under the 'projek sakit'. Certain committees will have to be set up before such actions can be taken. In particular, a 'Laporan Projek Sakit' must be prepared using a prescribed format. It is upon the decision of the committee established under SPP 8/2009 that a termination can then be properly and validly taken.

[107] Following the Ministry's instructions, the defendant indeed, withdrew its first letter of termination. Not only was the first letter of termination retracted, the defendant went on to resume relations under the contract. A meeting conducted by Wan Badaruddin bin Wan Ahmad Zahari (see p 46 of bundle B1) further illustrates the defendant's compliance and adherence to these guidelines. In the face of such evidence, the court must reject the defendant's contentions.

[108] For all the foregoing reasons, the court is therefore of the view that the first letter of termination is invalid. Before dealing with the second issue on quantum, the court proposes to deal with the third issue as it is posed. That issue being, 'whether the second termination is effective in the event that the first termination is invalid and the invitation to resume the contract was not accepted as the conditions of the Plaintiff to resume work were not acceptable to the Defendant.' The court has set out the exchange of correspondence between the parties following the defendant's retraction of the first letter of termination.

[109] It is evident that the parties, through the Ministry of Higher Education were unsuccessful in their negotiations on the terms of resumption of works. In my judgment, it was entirely within both parties' rights to set their respective terms for resumption of works when the defendant retracted the first letter of termination. That, however, has no bearing on the validity of the two letters of termination.

[110] Insofar at the second letter of termination is concerned, it actually is of no effect. The defendant cannot argue that both letters of termination are valid and of effect. If the first letter of termination is valid and effective, then it takes effect when it did. The second letter would be simply superfluous. To argue

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otherwise, with respect, does not make any sense. If the court agrees with the defendant that the first letter of termination is valid, there is no need for the court to examine the second letter of termination. The defendant cannot cherry pick which letter of termination it wants to rely on, depending on what the issue is.

[111] In any event, it is quite clear that the second letter of termination is invalid because of non-compliance of cl 51. In this second letter of termination, the plaintiff is alleged to be in breach as follow:

a) Gagal, enggan dan cuai untuk melaksanakan kerja-kerja yang telah diarahkan dan kerja tersebut tidak dapat disiapkan pada Tarikh Siap Kerja Baru yang telah ditentukan pada 30 Jun 2010.

b) Seharusnya kerja tersebut telah mencecah 100% siap tetapi dukacita kemajuan yang dicapai hanya 60%.

[112] No notice of breach of any of these matters mentioned in this second letter of termination was ever issued prior to the issuance of this letter of termination. Further, the matters relied on in this letter of termination are not to be found anywhere in the notice of breach dated 23 June 2010. It is the finding of the court that a fresh notice of breach should have been issued before the determination may be affected, especially where the defendant is relying on different grounds, which it is, in the present circumstances. Though awkwardly posed, this third issue must also be answered in the plaintiff's favour. The second letter of termination is therefore invalid for the reasons already set out.

QUANTUM

[113] In the light of the court's findings that the first letter of termination is invalid, the plaintiff is therefore entitled to damages for the unlawful termination. For the same reasons, the fourth and fifth issues which concerned the defendant's counterclaim for the LAD imposed and which is based on a lawful termination under either or both the letters of termination must also be answered in the plaintiff's favour. Consequently, the defendant's counterclaim is rejected.

[114] On the issue of quantum, the plaintiff's claim is confined to the claim for the balance of monies due for works completed as of 13 July 2010; loss of profits; damages for breach of contract; and damages for loss of reputation in relation to the blacklisting.

[115] It was the plaintiff's submissions that it was entitled to the sum of RM2,711,749.52 for the following reasons. First, the original contract sum was RM4,950,810. Together with VOs of RM98,196.44, the revised contract

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sum was RM5,049,006.44. The plaintiff has since received nine interim payments totaling RM2,113,910.30 leaving a balance of RM2,935,096.14 still due and unpaid. Then, there were materials left on site to the value of RM1,014,355.88; and the plaintiff received advances of RM1,237,702.50. The plaintiff claimed that under such calculations it would be entitled to a sum of RM2.711,749.52.

[116] Alternatively, the plaintiff argued that it ought to be paid on the basis of 85% completion of the contract works in which case the value of the contract should be RM4.291,655.47. From this sum would be deducted the nine interim payments of RM2,113,910.30 which have been received by the plaintiff and a further amount of RM341,367.51 which has not been recouped. Under such a formula, the sum due would be RM 1,836,377.66. The sum for materials left on site was however, not added to this calculation.

[117] It was the defendant's submissions that in the event the court found the terminations to be invalid, only nominal damages should be awarded. It was the defendant's argument that this was because the plaintiff had contributed to the delay which led to the termination. It was said that the plaintiff was 'hardly an innocent party'. The defendant further submitted that the court must factor in any payment that the defendant would have to pay a third party or contractor to finish the works under the contract. Learned counsel for the defendant had also attempted to diminish PW2's credibility by questioning the terms of his appointment; that he was not as independent as claimed; and that he had conducted an unauthorised site visit.

[118] On the matter of quantum, the court disagrees that compensation should be nominal. There is sufficient evidence before the court to support the plaintiff's claim. In fact, insofar as the witnesses are concerned, I find PW2's credibility sound and believable despite the questioning by the defendant's counsel. The fact that PW2 would stand to collect 1.5% of the amount successfully claimed does not, in itself and without more, mean that PW2's evidence is not credible. Such fees, rates or arrangements are standard industry practice, reasonable and fair.

[119] The defendant attempted to make some issue out of the plaintiff and PW2's visit to the site; that it was supposedly without authorisation. It is the court's view that nothing turns on this nor is it relevant to the issue at hand, which is the valuation of the works done. In fact, I find PW2 a responsible and competent witness to have prepared his report and valuation in the manner that he did, including a site visit so as to verify the plaintiff's claims. Such actions is proper, reasonable and in accord with good practice of all quantity surveyors. The court accepts his evidence and does not find any credible evidence from the defendant to challenge the final valuation prepared by PW2.

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[120] In contrast, I did not find the defendant's witnesses helpful especially in this respect. DW1 was entirely dependent on DW4 for the matter of valuation while the other witnesses focused on other matters.

[121] From the evidence led, the court is first of all, satisfied on the plaintiff's level of progress of the works; that the plaintiff had achieved a rate of 85% at the material time. The court accepts too, that the plaintiff did not complete the whole works, not however, due to its fault or default as has already been determined above. That being the case, the plaintiff's second application of EOT actually ought to have been favorably considered and allowed in the terms proposed by the plaintiff and, DW4, that is, three months.

[122] Be that as it may, the court is of the view that the plaintiff's compensation cannot be on the basis of 100% completion, since it is a fact that it did not. For monies still due and outstanding, that must be calculated on the basis of the level of completion at the material time. That level of progress is 85%. Even the defendant's witness and the records of meetings support this conclusion.

[123] For this level of completion, the court is satisfied that the plaintiff is entitled to the sum of RM2,719,593 as explained below. And, in this regard, the court has extensively reviewed the evidence of PW2 as seen at pp 189–243 of bundle B; and DW4's evidence.

[124] The total value of the contract is RM5,049,006.44 (the original contract sum was RM4,950,810 + VOs of RM98,196.44 = revised contract sum of RM5,049,006.44). The plaintiff has already been paid the sum of RM2,113,910.30 leaving a balance of RM2,935,096.14.

[125] However, a sum of RM341,367.51 should be deducted as the advance still not recouped; and a sum of RM883,215 for materials on site added to that sum; the outcome being that a balance of RM2,719,593 is still due and outstanding for the plaintiff's works. The court accepts that the correct value of materials on site is RM883,215 based on the defendant's own evidence. This sum was omitted in the defendant's calculations. In his evidence, DW4 admitted that he had failed to take this into account in his calculations and that the plaintiff was entitled to this sum.

[126] The court is however, not satisfied that the plaintiff has suffered any loss entirely by reason of being 'blacklisted'. A sum of RM300,000 had been submitted by learned counsel for the plaintiff as the appropriate sum. The court is not so inclined to make any award here without any more definitive evidence of loss of reputation in this regard. There was no submission or any

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real pursuit on a claim for loss of profits. Accordingly, the court will not make any award for these claims which in any case, are not sustainable since no evidence have been led.

[127] Consequently, the plaintiff's claim is found to be proved on a balance of probabilities; and the court hereby orders that the defendant do pay the plaintiff a sum of RM2,719,593 together with interest at the rate of 5% per annum from the date of judgment to the date of realisation. Further, the court orders that the injunction earlier ordered be lifted; and that the performance bond or the original bank guarantees are to be returned to the plaintiff. The defendant's counterclaim is furthermore dismissed. Lastly, the defendant is directed to pay the plaintiff costs of RM70,000.

Plaintiff's claim allowed and defendant's counterclaim dismissed.

Reported by Afiq Mohamad Noor